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**REPORTS OF CASES**

**ARGUED AND DETERMINED IN THE**

**SUPREME COURT OF APPEALS**

**OF**

**WEST VIRGINIA.**

**BY HENRY M. MATHEWS,**  
**Attorney General and Ex-Officio Reporter.**

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**VOL. VII.**

**FROM JULY 19, 1873, TO JULY 17, 1874.**

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**NAMES OF THE JUDGES**  
**OF THE**  
**Supreme Court of Appeals**  
**DURING THE TIME OF THESE REPORTS.**

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**PRESIDENT—ALPHEUS F. HAYMOND,**  
Of Fairmont, Marion County.

**JUDGE—JOHN S. HOFFMAN,**  
Of Clarksburg, Harrison County.

**JUDGE—JAMES PAULL,**  
Of Wheeling, Ohio County.

**JUDGE—CHARLES P. T. MOORE,**  
Of Point Pleasant, Mason County.

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**ATTORNEY GENERAL AND EX-OFFICIO REPORTER,**  
**HENRY M. MATHEWS,**  
Of Lewisburg, Greenbrier County.



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H. M. M.





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## NOTE.

**JUDGE HOFFMAN** was sick during a considerable portion of the period covered by this volume; and for this reason did not participate in the action of the Court in several cases herein reported. It is believed, however, that his absence or non-concurrence is noted, when necessary, in each case.

**REPORTER.**





## ERRATA.

- On page 29 for "W. Va., 1," read "1 W. Va., 1,"
- On page 72 for "Hiland," read "Howland."
- On page 74 for "McLure," read "McClure."
- On page 228 for "1863," read "1873."
- On page 308 for "Peters," read "1 Peters."
- On page 367 for "Buckie," read "Bucklin."
- On page 413 for "Harman," read "Wynn."
- On page 415 for "8 Leigh, 647," read "8 Leigh, 628."
- On page 463 for "Bailey," read "Bayly."
- On page 551 for "Patterson," read "Patteson."



# CASES DETERMINED

## IN THE

# SUPREME COURT OF APPEALS

## OF WEST VIRGINIA,

AT THE JUNE TERM THEREOF, HELD AT WHEELING, IN  
THE COUNTY OF OHIO, COMMENCING ON THE  
FOURTH DAY OF JUNE, 1873, AND END-  
ING ON THE TWENTY-SECOND DAY  
OF JULY, 1873.\*

### WHEELING.

CARSKADON v. WILLIAMS.

July 19, 1873.

- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                |   |   |    |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|---|----|-----|
| <p>1. A declaration in an action of trespass, for assault and battery, and false imprisonment, which alleges the cause of complaint sufficiently to make known to the defendant what he is to answer to, so that judgment, according to law and the very right of the case, could be given, is sufficient, in substance, and a demurrer thereto should be overruled.</p> <p>2. Belligerent rights having been conceded by the National Government to the Confederates, in the late Civil War, it is the duty of the Judiciary of this State to recognize the same principle, in actions against belligerents for acts done in conformity with military authority and under a military order.</p> <p>3. In such actions the plea of belligerent rights is admissible.</p> | <p style="text-align: center;">1874.<br/>June Term.</p> <table border="0" style="margin: auto;"> <tr> <td style="text-align: center;">7</td> <td style="text-align: center;">1</td> </tr> <tr> <td style="text-align: center; border-bottom: 1px solid black;">58</td> <td style="text-align: center; border-bottom: 1px solid black;">106</td> </tr> </table> | 7 | 1 | 58 | 106 |
| 7                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 1                                                                                                                                                                                                                                                                                                                                                              |   |   |    |     |
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\*Other cases decided at the June Term may be found reported in Vol 6, W. Va. Reports.

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4. Pleas of belligerent rights must allege, specifically, all matters necessary to show that the defendant acted in conformity with military authority and under a military order.
5. Where a plea, intended to be a special plea of belligerent rights, does not allege that the defendant committed the act complained of, but does allege that others committed the act, it simply amounts to the plea of "*not guilty*," and the *general issue* having been pleaded, it is proper to reject the intended special plea.
6. Declarations of one or more conspirators, cannot be proven to affect his or their fellow, until the fact of conspiracy between the parties has been first shown.
7. When the declarations of co-conspirators have been proven, by a witness not connected with the conspiracy, he may be cross-examined by defendant, as to defendant's statements during the transaction, as part of *res gestæ*.
8. In an action for false imprisonment, evidence as to the kind, quality and quantity of food, is not admissible, unless the fact is specifically alleged in the declaration.

This was an appeal from a judgment of the circuit court of Preston county, rendered on the 18th day of June, 1868. The Hon. John A. Dille, then judge of said circuit court, presided on the trial of the cause.

On the 25th day of July, 1864, the defendant in error, Isaac H. Carskadon, sued out of the clerk's office of the circuit court of Preston county, a summons against the plaintiff in error, Strother M. Williams, commanding him to appear and answer the plaintiff, in an action for trespass, assault and battery, and false imprisonment, "for that the said defendant, on or about the 23d day of November, 1861, with force and arms, &c., assaulted the said plaintiff, to-wit: at his house, in the county of Hampshire, West Virginia, and within the jurisdiction of this court, and then and there seized and laid hold of the said plaintiff, and with great force and violence, pulled and dragged about the said plaintiff, and then and there gave and struck the said plaintiff a great many violent blows and strokes; and also then and there forced and compelled the said plaintiff to go from and out of his home, situate and being in the said

county of Hampshire, West Virginia, and within the jurisdiction of this court, and then forced and compelled him to go in and along with the said defendant to the town of Staunton, in the county of Augusta, in the State of Virginia, and then and there imprisoned the said plaintiff, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to-wit: for the space of — days, then next following, contrary to the law and practice of this State, and against the will of the said plaintiff, whereby the said plaintiff was then and there greatly hurt, bruised and wounded, and was also thereby and there greatly exposed and injured in his business and circumstances, to-wit: at his home in the county of Hampshire aforesaid. And also for that the said defendant, on or about the 23d day of November, 1861, with force and arms, &c., again assaulted the said plaintiff, to-wit: at his home in the county of Hampshire, and within the jurisdiction of this court, and then and there beat, bruised and ill treated him, and then and there imprisoned him, and kept and detained him in prison, without any reasonable or probable cause whatsoever, for a long time, to-wit: for the space of — days, then next following, contrary to the laws and customs and against the peace of the Commonwealth, and against the will of the said plaintiff. And also for that the said defendant, on the day and year aforesaid, with force and arms, &c., again assaulted the said plaintiff, to-wit: at his home, in the county of Hampshire, Virginia, and within the jurisdiction of this court, and then and there beat and ill treated him, and other wrongs to the plaintiff then and there did, against the peace of the commonwealth, and to the damage of the said plaintiff of \$3,000."

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The cause was matured at rules, came upon the docket of said circuit court, and was continued until the June term, 1865, when the defendant appeared and demurred to the plaintiff's declaration and each count thereof, which demurrer, the court, upon argument, overruled;

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and thereupon the defendant pleaded not guilty, and issue was joined thereon.

At the September term, 1865, the defendant again appeared and filed what is termed in the record a special plea, alleging, *first*, "that before, and at the time when, &c., in the said declaration mentioned, a civil war existed and was being carried on between the government of the United States of America, and a government styling itself the Confederate States of America, and that at the time when, &c., in said declaration mentioned, the said plaintiff was a citizen of, and residing within the territory occupied by the said United States of America, and an enemy of the said Confederate States of America;" and, *second*, "that at the time aforesaid, the said defendant was in the service and army of the Confederate States of America, then so engaged in the said civil war, as aforesaid, and acting at that time under the command of Lieutenant Henry, an officer in the said army of the Confederate States of America, and being so in the army and service, as aforesaid, the said Confederate soldiers under the command of said Lieutenant Henry, did, at the time when, &c., in said declaration mentioned, from within the territory occupied by the said United States of America, take and carry away, as a prisoner, the said plaintiff, so being a citizen of the United States, as aforesaid, and an enemy of the said Confederate States of America, by the order and command of said Lieutenant Henry, so being such officer, in the Confederate army, as lawfully they might do for the cause aforesaid." The plaintiff replied, specially: "that at the time of the seizure of his person, by the said defendant, he, the said plaintiff, was a peaceable citizen of the United States, and not armed, or in the service of the United States, and as such owed allegiance to the government of the United States, and resided in West Virginia, and within the military lines of the United States, and while owing such allegiance to the government of the United States, and a non-combatant residing as aforesaid, the

said defendant did seize and carry away the person of the said plaintiff, &c., and this the said plaintiff prays may be inquired of by the country, &c.”

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The defendant demurred to the said special replication, and the plaintiff joined therein, and the same being argued, “it was insisted, by the plaintiff, that, on the principle of going up to the first fault, the said special plea should be overruled:” Whereupon the court quashed the said plea, as not sufficient in law to preclude the plaintiff from maintaining his action against the defendant, and continued the cause at the defendant’s costs.

On the twenty-second day of September, 1865, the defendant filed what is termed in the record, a *second* special plea, alleging, “that at the time when, &c., in said plaintiff’s declaration mentioned, a civil war existed and was being carried on by and between the government of the United States of America, and a government styling itself the Confederate State of America, and that at the time when, &c., in said declaration mentioned, the said plaintiff was a citizen of, and residing within the territory occupied by the United States of America, and an enemy of the said Confederate States of America; and said defendant further saith that at the time when, &c., in said declaration mentioned, he, the said defendant, was in the service and army of the said Confederate States of America, then so engaged in civil war as aforesaid, acting at the time under the command of Lieutenant Henry, an officer in the said army of the Confederate States of America, with other Confederate soldiers, and being so in the army and service of the said Confederate States of America, the said Confederate soldiers, under the command of said Lieutenant Henry did, at the time when, &c., in said declaration mentioned, from within the territory occupied by the said United States, and by the direction and orders of the said Lieutenant Henry, seize, take and carry away, as a prisoner, the said plaintiff, so being an enemy of the Confederate States of America, and said defendant avers that at the time when



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said plaintiff was so seized and taken prisoner as aforesaid, the said Lieutenant Henry commanding the said soldiers of the Confederate States of America, had good reason to mistrust the said plaintiff, and to believe that he would give information to the forces of the United States of America prejudicial to the cause of the said Confederate States, and would give them aid and comfort without this that said defendant used any more force than was necessary to capture and secure the said plaintiff as a prisoner; and so the said defendant says that for the cause aforesaid, they might lawfully seize, take, and carry away the said plaintiff, as a prisoner, as aforesaid, and that they are the same supposed trespassers in the plaintiff's declaration set forth."

The plaintiff filed a special replication to this second special plea averring that as "to the matters alleged in the *second* special plea of the defendant, the plaintiff ought not to be barred, &c., because he says that the defendant, at the time when he entered the Confederate service, and at the time of committing the assault, battery and imprisonment at, &c., was a citizen of the United States, residing and properly within the lines and territory of the United States, and so being a citizen and resident aforesaid, voluntarily deserted from the United States and joined the Confederate forces, and committed the said assault, battery and imprisonment in his own wrong." The defendant demurred to this replication and there was a joinder therein. The record states that the demurrer was lost, or mislaid.

On the twenty-first day of April, 1866, leave having been obtained therefor, the defendant filed *two* special pleas.

The *first* avers "that before and at time when, &c., in the said declaration mentioned, a civil war existed and was being carried on between the Government of the United States of America and a government styling itself the Government of the Confederate States of America; that before the time when, &c., the Govern-

ment of the United States by the President's proclamations of the nineteenth and twenty-seventh of April, 1861, and the act of Congress of the thirteenth of July, 1861, recognized that the said war then being carried on between the said Government of the United States and the government styling itself the Confederate States of America, was a civil war; that before and at the time when, &c., the State of Virginia had, by an ordinance of a convention of said State on the seventeenth day of April, 1861, cast off its allegiance to the United States and declared its independence thereof, and with other citizens of the United States of America, had organized armies and commenced hostilities against the United States, and occupied and held a portion of the territory of the United States, including a portion of the then State of Virginia, in armed hostility to the United States; that at the time when, &c., the county of Hardy, in the State of Virginia, was so held by the State of Virginia, in hostility to the United States, and by the armies of the said Government of the Confederate States; that at the time when, &c., the said defendant was a resident of said county of Hardy, in the State of Virginia, and a citizen of said State, within the territory of the United States, thus held in a hostile manner to the said Government of the United States, and subject to the power and control of the said government styling itself the Confederate States of America, and to the power and control of the said Government of Virginia, in armed hostility to the said Government of the United States, and that he, the said defendant was then and there subject to the power and control of the said Government of the Confederate States, and of the Government of the State of Virginia, then and there engaged in armed hostility to the said Government of the United States, and that the said defendant before the said time when, and after the said war was recognized as a civil war by the President and the Congress of the United States as aforesaid, on the — day of —, 1861, had

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been duly enrolled as one of the militia of the said State of Virginia, in the fourteenth regiment of the militia of said State, in the county of Hardy, before the formation of the State of West Virginia, in which county of Hardy, the said State of Virginia in armed hostility to the United States exercised its power, authority, and control, and required obedience to its laws, and constituted authorities, and over which the restored Government of Virginia exercised no power or control, its territory being held and occupied by the armies of said Confederate States, and of the State of Virginia, in opposition and hostility to the said Government of the United States, and to the said restored Government of Virginia, and at the time when, &c., the said defendant being so enrolled in the said fourteenth regiment of the militia of Virginia, the said regiment, by the order of John Letcher, Governor of the State of Virginia, and commander-in-chief of the militia of said State, was called into active service in the then existing civil war, and he, the said defendant, as one of the members of said regiment, was required to engage in said civil war as a soldier of said regiment, under the command of Wm. H. Harness, the colonel thereof, and said regiment and defendant as a member thereof, was made subject to the orders of the said Confederate Government, and of the officers in the army thereof. And said defendant avers that at the time when, &c., the said plaintiff resided in the county of Hampshire, in the State of Virginia, and within the territory then held and occupied by the armies of the United States, and within the control and power of the United States, and within that portion of the State of Virginia, over which the reorganized Government of Virginia exercised control; that said plaintiff recognized the reorganized Government of Virginia, as the true and lawful Government of Virginia; that his fidelity was due to said reorganized government; that he claimed to be a citizen of, and to owe allegiance to, the Government of the United States, and was, and claimed

to be, an enemy of the said Confederate States, and of the State of Virginia, and her citizens, which were in armed hostility to the United States, and the reorganized Government of Virginia, and that at the said time when, &c., a portion of the army of the said Confederate States, under the immediate command of Lieutenant Henry, of the Charlotte cavalry, made an incursion into the said county of Hampshire, and within the territory then held and occupied by the United States, by its armed forces, with which command the said defendant was required and commanded by the said Lieutenant Henry, an officer of the said Confederate States army, to join himself as one of the militia of the said fourteenth regiment of Virginia militia, then in the actual service of the Confederate States, and to act in concert therewith, which command said defendant could not resist, and that at the time when, &c., the said Lieutenant Henry, so being an officer in the army of the said Confederate States, and in command of the said Charlotte cavalry to which said defendant was then and there attached as a soldier in the Confederate army, and of which command he formed a part, ordered and commanded the said defendant, and other members of said Charlotte cavalry, to arrest, seize, take, and imprison the said plaintiff as an enemy of the Confederate States and of the State of Virginia then engaged in civil war with, and against, the United States, and said defendant avers that the said Charlotte cavalry to which he was then and there attached at the said time when, &c., under and by virtue of the authority of said orders and command of the said Lieutenant Henry, arrested, seized, took, and imprisoned and carried away the said plaintiff as in his said declaration set forth, as lawfully they might do, which is the same supposed trespass in the said plaintiff's declaration mentioned; without this that he committed any other further trespass."

The *second* avers "that before and at the time when, &c., a civil war existed and was being carried on between the United States and a government styling itself

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the Confederate States of America, which civil war was before the time when, &c., recognized by the United States by the President's proclamations of April 19th and 27th, 1861, and by the act of Congress of July 13th, 1861; that at the time when, &c., the plaintiff was a citizen of the United States residing in the county of Hampshire, in the State of Virginia, and claimed to owe allegiance to the United States, and recognized the restored Government of Virginia as the only true and rightful Government of the State of Virginia, and was an enemy of the said Confederate States of America; that said plaintiff was within the territory held and occupied in the State of Virginia by the armies of the said United States in opposition to the armies of the said Confederate States of America, the territorial boundaries of the two hostile parties being marked and defined by lines of bayonets; that said defendant was, at the time when, &c., a resident of the county of Hardy, in the State of Virginia; that said county was then held and occupied by the armies of the Confederate States, and was controlled by the Government of Virginia, hostile to the United States; that the restored Government of Virginia did not then and there exercise control and authority in said county; that he, the said defendant, was then and there subject to the control and authority of the said Confederate Government and the Government of Virginia, in armed hostility to the United States; that he was, before said war and at the time of said alleged trespass, enrolled as one of the militia of said county; was, after the commencement thereof, called into active service against the United States, by the hostile Government of Virginia, and could not resist that call, and was under and subject to the orders of the officers of the Confederate States army.

And said defendant further avers that at the time when, &c., a portion of the army of the Confederate States under the command of Lieutenant Henry, an officer of the Confederate States army, made an incur-

sion into the said county of Hampshire and within the territory then held and occupied by the armies of the United States, with which command the said defendant was then and there required and commanded by said Lieutenant Henry to unite himself, and which he could not resist, and that at the time when, &c., the said Lieutenant Henry, so being the officer in command of that portion of the army of the Confederate States to which said defendant was then attached, and of which he formed a part, ordered and commanded the said defendant, and other members of his said command, to arrest, seize, imprison, take and carry away the said plaintiff, then and there being an enemy of the said Confederate States, and within the territory held and occupied by the said United States. And said defendant avers that the said plaintiff was then and there arrested, seized, taken, &c., under and by virtue of said order, command and authority of said Lieutenant Henry, an officer of the Confederate States of America, then commanding said expedition, as in the plaintiff's declaration set forth, by the members of said command, as lawfully they might do, and said defendant avers that the said arrest and capture was a legitimate act of war.

And said defendant further avers that subsequently, to-wit, on the — day of May, 1865, and after the time when, &c., the President of the United States and commander-in-chief of its armies, issued his Proclamation of Amnesty in favor of persons engaged in said civil war against the United States, relieving them from all the consequences of their legitimate acts of war during the same, and that he, the said defendant, on the — day of August, 1865, availed himself of the benefits of said Amnesty Proclamation, took the oath thereby prescribed, and he avers that the said alleged trespasses are thereby discharged, condoned and pardoned, and said defendant avers that he committed no further or other trespass against said plaintiff."

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On the thirty-first day of October, 1867, the cause having been continued from term to term, either generally or at the costs of the defendant, the plaintiff appeared and demurred to the two special pleas of the defendant, filed April 21, 1866, in which demurrer the defendant joined, and the court adjudged the said pleas insufficient in law and sustained the demurrer. At the same time the court proceeded to dispose of the defendant's demurrer to the plaintiff's special replication to the defendant's special plea, filed September 22, 1865, and, "upon the principle of going up to the first fault," the court considered that the said plea is not sufficient in law, and, thereupon that the same be quashed.

On the 12th day of June, 1868, the cause having been continued from term to term, either generally or at defendant's costs, a jury was sworn in the cause, and on the next day they rendered a verdict finding the defendant guilty, and assessing the plaintiff's damages at \$1,340. The record does not show that the jury was sworn to try any issue, or to assess damages.

On the 18th day of June, 1868, the defendant moved to set aside the verdict of the jury and grant him a new trial, which motion the court overruled and rendered judgment on the verdict of the jury aforesaid, and for the amount of damages assessed by the jury, as aforesaid, with legal interest thereon from June 13, 1868, and the costs in said circuit court expended.

On the trial of the cause the defendant tendered *three* several bills of exception to certain opinions of the court given upon the trial.:

The *first* avers "that upon the trial of the issue in this cause the plaintiff, to support the issue on his part, without having offered any other evidence, introduced Abraham Ashby, a witness, and proposed to prove by him that in the latter part of November, 1861, and about 2 or 3 o'clock in the afternoon, he fell in with some eight or ten men about five miles from Moorfield, going in the direction of the residence of the plaintiff, among whom

was the defendant, who was armed with a revolver, and that the witness traveled with them about ten or twelve miles, and parted with them about that distance from the residence of the plaintiff, whom he left going in that direction, and that whilst the witness was so traveling along with such persons, one Charles Lobb, Joseph Vandever, and some other person of the party, but not the defendant, said they were going after the Carskadons, though at the time this was said the witness did not know where the defendant was, or whether he heard or could have heard what they said, but that he was somewhere along the road with some of the party. To the introduction and proof to the jury of the said statement of the — Charles Lobb, Joseph Vandever, and another above mentioned, the defendant, by his counsel, objected, but his said objection was overruled, and after the said statement had been proved to the jury by the plaintiff, the defendant on cross-examination of the said witness, asked him to state whether the said defendant, at the time they were so traveling along the road, as aforesaid, with the said party, said anything about where he was going, or the purpose for which he was going; if so, state what he said: to this question the plaintiff, by his counsel, objected, and his said objection was sustained by the court, and the witness was not permitted to answer the same; to which said judgment of the court in overruling the objection of the defendant and permitting the witness to give the above statement of the said Charles Lobb, Joseph Vandever and another, to the jury, and that of sustaining the objection of the plaintiff before mentioned, to the inquiry of the defendant as to what was said by him as aforesaid, the defendant, by his counsel, excepts."

The *second* avers "that upon the trial of the issue in this cause, the plaintiff, to support the same on his part, introduced John R. Carskadon, a witness, and asked him to state to the jury the kind and quality and quantity of food that was furnished to the plaintiff whilst he

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was detained as prisoner in the town of Staunton, Virginia. To this question the defendant, by his counsel, objected, because the same was irrelevant, and because there was no averment in the declaration that improper, unwholesome or insufficient food was furnished the plaintiff, but the said objection was overruled, and the witness permitted to answer and make such statement, merely to show the character of the imprisonment, and who did state that the said plaintiff was furnished very poor food, and in quantity not more than half of what was sufficient; that among the food furnished, witness believed was horse meat. To the judgment of the court in overruling the said objection of the defendant, and permitting the said witness to answer and make such statement to the jury, the defendant, by his counsel, excepts."

The *third* avers that "be it remembered, that after the jury had rendered their verdict in this cause, the defendant moved the court to set aside the same and grant him a new trial, because the same was contrary to the evidence, and because the damages assessed by the said jury were excessive, which said motion the court overruled and entered judgment upon the said verdict. To the overruling of said motion and giving judgment on said verdict, the defendant, by his attorney, excepts, and prays that these his exceptions may be signed, sealed, and made a part of the record of this cause, which is done accordingly; and thereupon the court proceeded, upon the motion of the said defendant, to certify the facts proven upon the trial, as follows, to-wit: That in the latter part of November, 1861, about eleven o'clock at night, a number of men came to the house of the plaintiff, then in the county of Hampshire, Virginia, and now in county of ———, in the State of West Virginia, and called the plaintiff to the door and arrested him and carried him to Moorefield, and from thence to Staunton, Augusta county, Virginia, and there imprisoned him in a jail and detained him there for about two weeks;

and after about five weeks from the time of his arrest released him ; that the number of persons along with those who made the capture was about twenty ; that on the day preceding the night of the capture or arrest of the plaintiff, the defendant was seen on the road leading from Moorefield to the house of the plaintiff in company with a party of eight or ten Confederate soldiers, all going the same direction from Moorefield towards the plaintiff's house aforesaid ; that defendant was armed with a pistol, and pretty much as the others were armed, and that whilst the defendant was so on the said road going towards the plaintiff's house with the said soldiers, some of the said party (but not the defendant) said that they were going to capture the Carskadons ; that the defendant at the time the plaintiff was captured was on horse-back in the road, near the house where the plaintiff was captured ; that he had accompanied the party who captured the plaintiff from near Moorefield to the place of the capture, and some twelve or fourteen miles back on their return, at which last place the defendant left them ; that the forces who made the capture were commanded by Lieutenant Henry, of the Charlotte cavalry, and was principally composed of said cavalry ; that defendant did not belong to said cavalry, but did belong to the 14th regiment, Virginia militia, then in actual service ; that the said party of men with whom the said defendant was so seen on the way from Moorefield, was a scouting party under command of a lieutenant whose object was to obtain information ; that the defendant, for his personal safety, kept in company with said scouting party who were behind the Federal lines ; that there was at the time a considerable force of Federal soldiers at Romney, a few miles from where the said capture was made ; that the plaintiff was taken into custody by some of said company of Confederate soldiers, but not by the defendant ; but it was proven by a witness, Bailey, who was captured at the same time, that he was captured by the defendant Williams, and a man by the name of Vandever,

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but it was also proven by Joseph V. Williams, one of the command, that Lieutenant Henry and Joseph. V. Williams captured the said Bailey, and that the defendant was not present, but was out in the road about two hundred yards off between the plaintiff's house and said Bailey's. That the order to capture the plaintiff was given about 200 or 300 yards from the house in which the plaintiff then was; that the night was rainy and dark at times, at other times it could be seen that there was a moon; that at the same time the plaintiff was so captured, John R. Carskadon was also captured by the same men, or a portion of them; that they were both carried off together with said Bailey; that the said Carskadons were not personally acquainted with the defendant; that they had never seen him to know him; that about ten or twelve miles from where they were so captured, the guard of the said John R. was changed; that from something said by said guard the said John R. was induced to think that the man who was then guarding him and who continued along with him for a distance of from three to six miles was the defendant; that whilst the said John R. was so riding along with the said guard, so supposed by him to be the defendant or some one in the neighborhood, he, the said John R. Carskadon, noticed particularly the face of his said guard, with a view to recognize him in the future; that the said John R. did not see the person so guarding him again until the latter part of the summer, or early in the fall, of 1862 or 1863, when he casually met a man on the railroad track, at New Creek, walking, when and where it suddenly flashed across his, the said John R.'s mind, that it was the same person whose face and features he had so noticed as aforesaid, when guarding him as aforesaid, and who he then learned was the defendant Williams. The defendant proved by his own oath, &c., that he was not connected, in any way or manner, with the capture or carrying away or imprisonment of the said plaintiff or the said Bailey, and did not go with said company of Confed-

erate soldiers for this purpose, and was not while with them under its orders or command."

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In view of the importance of the principles adjudicated in this case the reporter has deemed it proper to incorporate into the statement of the case the pleadings at length. He is not aware that the forms of pleadings in such cases are to be found in any work on pleading, or, indeed, in any treatise, or volume of reports.

*Caleb Boggess* for appellant.

*C. W. B. Allison* and *William G. Brown* for appellee.

MOORE, JUDGE:

This is an appeal taken by Strother M. Williams, from the rulings of the circuit court of Preston county, in an action of trespass on the case, instituted by Carskadon against him, for assault and battery, and false imprisonment.

The first question of error assigned is the overruling the demurrer to the declaration.

Technically, at common law, the declaration would not be strictly correct, but under the liberality of our statute, there is nothing omitted in the declaration "*so essential to the action* (or defence,) that judgment, according to law and the very right of the cause," could not be given. It is sufficient, in substance, to make fully known the cause of action which the defendant is to answer to, and to enable the court to give judgment *according to law and the very right of the cause*. The demurrer was properly overruled.

To the declaration, the defendant, in addition to the plea of the general issue, filed two special pleas in writing, to which the plaintiff filed a special replication, and upon demurrer to the replication, by the defendant, the court, acting upon the principle of going back to the first fault in pleading, as insisted on by the plaintiff in the argument of the demurrer, held the special pleas insufficient in law, and quashed them. The pleas, no

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doubt, were intended to be, what have commonly been designated in our courts, pleas of belligerent rights. They are not sufficiently specific for that purpose, but are defective in allegations material to a plea of that kind. The pleas do not indicate that he acted in, or was connected with the matters complained of, but allege that others committed the trespass complained of, namely: "The said Confederate soldiers, under the command of said Lieutenant Henry, did, at the time when, &c., in said declaration mentioned, from within the territory occupied by the said United States of America, take and carry away, as a prisoner, the said plaintiff, &c." If the trespass was committed by other parties than the defendant, the fact could have been proven under the general issue—the plea of "*not guilty*;" and these two special pleas, framed as they are, amount to nothing more than general issue pleas; and as the proper form for the general issue to such complaint is "*not guilty*," and that plea had already been put in, the court did not err in quashing them.

Afterwards, leave having been given, by consent, to the defendant, to file additional pleas, the defendant, on the twenty-first day of April, 1866, filed two pleas, in writing, which were demurred to by the plaintiff, and the court sustained the demurrer, and the pleas were rejected.

The pleas were in bar of the action, and commonly called pleas of belligerent rights. They are proper in form and substance, and were rejected no doubt, under the rulings of the Supreme Court of Appeals in this State, which has heretofore held that such pleas were not admissible in actions similar to this.

The concession of belligerent rights was made by the National Government, in all its departments, to those of the Confederate side, in the late civil war, and the recognition of that concession by the nations of the earth, together with acts of the Legislature and the provisions of the Constitution of this State to the same effect,

demand of the Judiciary of this State a similar recognition. Those rights having been recognized and acted upon by the Federal authorities in their struggle against the Confederate powers, must be recognized and admitted by the Judiciary of this State now. If the defendant acted in conformity with military authority and in execution of a military order, the act must be considered a belligerent act, in the legal import of the term, and he is not liable to a civil action.

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The pleas being proper in themselves, but having been rejected in consequence of the rulings of the Supreme Court, which were wrong in principle, and which misled the circuit court, the defendant should be permitted to file the pleas.

As to the sixth error assigned, viz: That "the court erred in swearing the jury '*according to law*,' and not to try the issue."

The proper way is to swear the jury to try the issue joined, and the record should show it. But as the record in this case shows that the defendant was present at the time, it must be presumed that the jury were sworn to try the issue joined, as the defendant took no exception, then, to the mode of swearing, and the record says they were sworn according to law; the objection after verdict, comes too late.

The seventh assignment of error is to the rulings of the court as set out in the first bill of exceptions. The plaintiff introduced the witness Ashby and proposed to prove by him, that in the latter part of November, 1861, and about two or three o'clock in the afternoon, he fell in with some eight or ten men about fifteen miles from Moorefield, going in the direction of the residence of the plaintiff, among whom was the defendant, who was armed with a revolver, and that the witness traveled with them for about ten or twelve miles, and parted with them about that distance from the residence of the plaintiff, whom he left going in that direction, and that whilst the witness was so traveling along with such persons, one

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Charles Lobb, Joseph Vandever, and some other person of the party, but not the defendant, said they were going after the Carskadons, though at the time this was said the witness did not know where the defendant was, or whether he heard or could have heard what they said, but that he was somewhere along the road with some of the party.

The defendant objected to the introduction and proof to the jury of the said statements of Lobb, Vandever and another, but the court admitted the proof of the statements.

The admission of such evidence was not proper, because no foundation had been laid, by proof, to establish, *prima facie*, the fact of conspiracy, or combination between the parties. Nor does it appear that the evidence was admitted by the court, for the sake of convenience, upon the prosecutor undertaking to furnish such proof in a subsequent stage of the cause.

I think the admission of the evidence of those declarations was not in accordance with the rules established in such cases, and the court therefore erred. 1 Green. Ev. sec. 111.

Had it been proper to have admitted proof of those declarations, then the court would have erred in its refusal to admit the declarations of defendant, afterwards asked for on the cross-examination, because in such a state of the case his declarations would have been part of the *res gestæ*, and certainly necessary to his defence.

The court also erred in admitting proof of the kind and quality, &c., of the food furnished plaintiff while in prison; because there was no allegation in the declaration to give the defendant notice of such a special damage, and the law does not necessarily imply that the plaintiff sustained such damage from the acts as alleged in the declaration. In 1 Ch. Pl. 6 Am. ed. pp. 371, 440-444, it is said: "Thus in an action of trespass and false imprisonment, where the plaintiff offered to give in evidence, that during his imprisonment, he was stinted in his allowance

of food, he was not permitted to do so, because that fact was not, as it should have been, stated in his declaration;" and in a similar action, it was held "that the plaintiff could not give evidence of his health being injured unless specially stated." Mr. Greenleaf lays down the same doctrine in his Treatise on Evidence.

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I am therefore of opinion that the judgment of the circuit court is erroneous, and should be reversed with costs, the cause remanded and a new trial awarded, the demurrer to the belligerent rights pleas overruled and the plaintiff required to reply to the said pleas, and the cause to proceed under the principles here adjudicated.

The other Judges concurred.

JUDGMENT REVERSED AND CAUSE REMANDED.

NOTE BY THE REPORTER.—At the same term the principles adjudicated in the foregoing decision were affirmed in the case of John R. Carskadon *v.* same defendant, on an appeal, by defendant, from the judgment of the circuit court of said Preston county.



## WHEELING.

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## GAS COMPANY v. WHEELING.

July 22, 1873.

1. The provision of section 2, of chapter 124, of the Code, as amended in 1871, "that process shall be returnable within ninety days from its date," is applicable to a summons in unlawful detainer.
2. Such a summons, returnable to a term of the circuit court, not expressly to the first day, or to any day thereof, upon the authority of a case decided by the Court of Appeals of Virginia, is good.
3. When a summons in unlawful detainer is returnable to the first day of a term of the circuit court, or to the court generally, when that is equivalent to the first day of the term, it is not necessary that the court should make any order to docket the case.

This was an appeal, by the plaintiff below, from the judgment of the circuit court of Ohio county, rendered on the thirty-first day of October, 1872. The Hon. Thayer Melvin, Judge of the First Judicial Circuit, presided at the trial of the cause.

On the sixteenth day of June, 1871, the Wheeling Gas Company sued out of the Clerk's office of said circuit court of Ohio county, a summons in unlawful detainer, against the city of Wheeling, Andrew J. Sweetney, Michael Reilly, William B. Simpson, George W. Jeffers, Perry Tracy and William Newton Tracy, commanding the said defendants to appear before the circuit court aforesaid, "*at the term thereof to be commenced in the month of October next,*" (which was the third Monday of October and the sixteenth day of the month), to shew cause why they unlawfully withheld possession from the said plaintiff, of certain lots and parts of lots, situated in said city, and particularly described in the summons. The

cause was entered on the trial docket of said court, for trial, on the sixteenth day of October, 1871, that being the first day of the October term, and was, subsequently, continued, generally, for the term. The cause was continued, pursuant to the statute, without any special order therefor, from term to term until the October term, 1872, when the defendants appeared and cravedoyer of the said summons, and moved the court to quash the same, which motion the court sustained and dismissed the said cause at the costs of the plaintiff. To this ruling and opinion the plaintiff excepted and tendered its bill of exceptions, which was signed and made a part of the record. It is not deemed necessary to further allude to said bill of exceptions as the substance of the same is hereinafter set forth. The statutes alluded to in the opinion of the court are sufficiently set forth therein.

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*James S. Wheat, Daniel Lamb and Joseph H. Pendleton,*  
for the appellants.

*C. W. B. Allison and George W. Jeffers,* for the appellees.

HOFFMAN, JUDGE:

Chapter 124 of the Code relates to "process and the order of publication." The first division relates to "process generally." In the year 1871, section 2 was amended and re-enacted so that it is as follows:

"Process from any court, whether original, mesne or final, may be directed to the sheriff of any county, except that process against a defendant (unless a railroad, canal, turnpike, telegraph company or insurance company be defendant) to answer any action brought under the second section of chapter 123, shall not be directed to an officer of any other county than that wherein the action is brought. Any process may be executed on, or before, the return day thereof. If it appear to be duly served, and good in other respects, it shall be deemed valid, although not directed to any officer, or if directed to an officer, though executed by any other to whom it

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might lawfully have been directed. Process to commence suits, including writs of *scire facias*, *mandamus*, prohibition and the *alias* or other process, when the original is returned not executed, may also be served by any credible person; and the return of such person, verified by his affidavit, shall be evidence of the manner and time of service. Any process shall be returnable within ninety days after its date, to the court on the first day of a term, or in the clerk's office, to the first Monday in a month, or to some rule day, except as follows: A summons for a witness shall be returnable on whatever day his attendance is desired, and an order of attachment may be returnable to the next term of the court, although more than ninety days from the date of the order, and process awarded in the court may be returnable as the court may direct."

Chapter 89 relates to "summary remedy for unlawful entry and detainer," in the circuit court. Sections 1 and 2 are as follows:

"1. If any forcible or unlawful entry be made upon lands, or if when the entry is lawful or peaceable, the tenant shall detain the possession of land after his right has expired, without the consent of him who is entitled to the possession, the party so turned out of possession, no matter what right or title he had thereto, or the party against whom such possession is unlawfully detained, may within three years after such forcible or unlawful entry, or such unlawful detainer, sue out of the clerk's office of the circuit court of the county in which such land, or some part thereof, may be, a summons against the defendant to answer the complaint of the plaintiff, that the defendant is in the possession and unlawfully withholds from the plaintiff the premises in question (describing the same with convenient certainty); and no other declaration shall be required.

"2. The summons may be returnable to and the case heard and determined at any term of such circuit court. Such summons shall be served at least ten days before

the return day thereof. If the defendant appear, he shall plead to the summons, and his plea shall be 'not guilty.' Upon this issue, or upon the return of the first, or any subsequent summons, 'executed,' if the defendant fail to plead, a jury shall be impanelled to try whether he unlawfully withholds the premises in controversy. Such cause shall have precedence for trial over all other civil causes on the docket."

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Section 2 of chapter 124 is general in its operation—applicable to any action, suit or proceeding in which a summons or other process issues from a court, unless some legal provision excludes it from operation in a special class of cases. The proceeding for forcible or unlawful entry or unlawful detainer, is an action in which such process is issued.

Even under former law, when the proceeding was instituted by a warrant from a justice of the peace, requiring an officer to summon the wrong-doer to appear before two justices of the peace, who, by that authority, should hold a court to try the complaint, it was held that the proceeding was an action subject to a statute applicable to civil actions generally. *Harrison v. Middleton*. 11 Gratt. 527; *Kincheloe v. Tracewell*, *Id.* 587. When, by subsequent legislation, it was provided that the proceeding should be commenced by a summons sued out of the clerk's office of the circuit court, and that the case should be heard and determined by that court, if there had been doubt on the subject before, none can now remain, that the proceeding was and is an action, to which general statutory and judicial regulations of practice are applicable, except so far as they may be excluded by special provisions.

Section 2 of chapter 124 prescribes to whom process may be directed, by whom and when it may be served and returned, how the return shall be verified, and within what time and to what day of a term of the court, or rules in the office, it shall be returnable. So comprehen-

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sive was it intended that these provisions should be regarded, that it was deemed proper to annex a special exception to exclude a summons for witnesses, an order of attachment and process awarded in court, from the rigid operation of the statute, and subject such process to the discretionary action of the court.

The section requires that process shall be returnable within ninety days after its date. This provision applies to a summons in unlawful detainer, which is such process.

At the first reading of section 2 of chapter 89, it strikes the mind forcibly that it was intended to authorize the summons to be returnable to any term of the circuit court, without regard to the provisions of section 2 of chapter 124, requiring that the process shall be returnable within ninety days from its date. But a careful examination of the subject enforces upon the understanding a different construction.

As far back in the last century as I have examined the legislation on the subject, and thence till the Code of 1849 took effect, process to commence actions and suits in the General Court, County Courts, District Superior Courts, County Superior Courts, High Court of Chancery and Circuit Superior Courts of Law and Chancery—all the courts of record in the State having original, legal or equitable jurisdiction, were by law required to be made returnable to the first or some other day of the next term of the court after the date of the process. or the first quarterly term of the county court, or some previous rule day. Such process was never, during the period referred to, returnable at a time beyond the first term of the court after its issuance. Under the code of 1849, the process was returnable, as according to the law of this State already quoted, it is returnable.

What is here said is true, not only as to process in personal actions, but to the writ of right.

In the year 1813, the warrant of forcible or unlawful entry or detainer, was made returnable not less than ten,

nor more than twenty, days after its date. This con-  
 tinued to be the law, till, in the year 1849, in the Code,  
 and in the year 1857, the same provision was enacted,  
 which, in 1869, was adopted as a part of the Code of this  
 State,—except that by the Code of Virginia the sum-  
 mons was returnable to, and the cause heard in, the coun-  
 ty court; and by the act of 1857, the county or circuit  
 court; whereas, by the law in the Code of this State,  
 the summons, when not brought before a justice, is return-  
 able, and the case heard and determined, in the circuit  
 court.

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Unquestionably there should be a legislative limit to the time within which a summons in forcible or unlawful entry or unlawful detainer shall be returnable. Otherwise a party might require another to appear and answer at any time that he might fix, however remote, no matter how inconvenient, by change of residence or other circumstance, it may have become for him to do so. Thus it would be in the power of one party to delay another and keep him in suspense for years, or to wait till under the statute the time was about to expire within which he might institute the proceeding; and then have the summons made returnable after any number of years—even many more, than, computed from the time when the right accrued, would bar the suit—and so avoid the operation of the statute of limitations, intended for the protection of the party having the possession. As a legislative prescription of the time within which the summons should be returnable is undeniably proper, and is found in section two of chapter one hundred and twenty-four, and no where else, we cannot but attribute to that section such application to this subject.

The purpose of section two of chapter eighty-nine, was not to withdraw a summons in forcible or unlawful entry or unlawful detainer from the influence of the provision that “process shall be returnable within ninety days from its date.” That section does not specify whether the process shall be returnable to the next term

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of the court after its date or a subsequent term, or whether to the first or a later day of the term. It was clearly not intended to allow the summons, at the pleasure of the plaintiff, to be made returnable at any term of the court he might name, in the distant future.

As chapter eighty-nine left the regulations of section two of chapter one hundred and twenty-four, relative to the direction and manner of service of the summons and the verification of the return applicable to suits for forcible or unlawful entry or unlawful detainer, so it left the rule as to the time after the date, within which the summons should be returned, likewise applicable to the same class of cases.

The object of the provision that "the summons may be returnable to and the case heard at any term of the circuit court," is to confer on that court jurisdiction of the class of cases to which it relates.

This construction cannot so prevent a party from asserting his right to the action in question as to occasion serious inconvenience.

There is no very strong reason why the summons in unlawful detainer should, or should not, be returnable to a rule day—unless the provision of the statute that process shall be returnable within ninety days, and the failure of the court to sit within such time after the party determines to sue, be deemed to furnish such reason. Process has long been, and still is, returnable to the first day of the term of a court, in cases in which an appearance cannot be made, if at all, for any practicable purpose, till the next rule day thereafter; because the case must be matured at rules for trial in court. That a summons in forcible or unlawful entry or unlawful detainer should be returnable to a rule day, is certainly far more reasonable than that practice. Upon such an appearance the defendant might plead, and from that time to the sitting of the court each party could prepare for trial. But the legislature, in section 2, of chapter 89, has provided that in forcible or unlawful entry or un-

lawful detainer, on the return of the summons executed, whether there is an issue or not, a jury shall be impanelled to try the complaint of unlawful holding; so that there is, generally at least, no necessity for rules to mature the cause for trial. And the Supreme Court of Appeals, in the case of *Gorman v. Steed*, held, that in such case, a summons could not be made returnable to rules. W. Va. 1.

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But if the statute does not authorize the return of the summons to a rule day, the party may have it issued within three years after the cause of the proceeding accrued, early enough to have the process served, at least ten, and not more than ninety, days before a term of the court. If he will exercise the necessary forethought, he may so regulate the commencement of the proceeding as to bring it within all these conditions. Moreover, in a case of unlawful entry or detainer—though perhaps not in the case of forcible, but not otherwise unlawful entry—the party may bring his action of ejectment, and may, as conveniently as by the proceeding in question, have the like redress, with the important additional advantage that the judgment will conclude further litigation on the subject.

But it is not necessary now to consider this matter. It is clear to our minds that the time after the date of the summons, within which it must be returned, should be limited, and manifestly, by the provision in section 2, of chapter 124, such limitation is provided.

Section 2, of chapter 124, requires that the summons shall be returnable to the court on the first day of the term or in the clerk's office to the first Monday in a month, or some rule day. The Revised Code of Virginia of 1819 required that a writ of *capias ad respondendum* should be returnable either to the first day of the next succeeding term, or in the clerk's office to some previous rule day. 1 R. C. Ch. 128, § 70. Under this provision it was held by the Court of Appeals that a writ returnable generally to the "next term" of a circuit



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court after its date, not to the first day of the next term, was good. *Hare v. Niblo*, 4 Leigh, 359. We submit to the authority of this case, and recognize its application to the case in hand.

When a summons to institute an action, suit or other proceeding, is returnable to the first day of a term of a court, or to the term generally, when that is equivalent to the first day of the term, it is not necessary or proper that the court should make any order to docket the case. We have no doubt of this, without reference to authority. But the Supreme Court of this State, in the case of *O'Brien and others against Camden* sustains this opinion. 3 W. Va. 20.

In this case, on the 16th day of June, in the year 1872, the Wheeling Gas Company sued out of the clerk's office of the circuit court of the county of Ohio, a summons in unlawful detainer against the city of Wheeling, Andrew J. Sweeney, George W. Jeffers, Perry Tracy and William Newton Tracy, returnable "at the term thereof to be commenced in the month of October next" thereafter, which was the third Monday, the 16th day of October, in the year 1872, more than ninety days after the date of the summons. This was returned, but no notice was taken thereof on the record, till during the same term, on the 28th day of October, 1872, the defendants moved that the summons be quashed; whereupon it was, by the court, ordered that the summons be quashed and that the cause be dismissed; and from this judgment, the plaintiff appealed.

For the reasons stated, we are of opinion that the judgment of the circuit court was correct and should be affirmed with damages and costs.

HAYMOND, President, and MOORE, Judge, concurred.

Absent, PAULL, Judge.

JUDGMENT AFFIRMED.

CASES DETERMINED.  
IN THE  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA,

AT THE AUGUST TERM THEREOF, HELD AT CHARLES-  
TOWN, IN THE COUNTY OF JEFFERSON, COM-  
MENCING ON THE SIXTH DAY OF  
AUGUST, 1873, AND ENDING ON  
THE TWENTY-SECOND DAY  
OF AUGUST, 1873.

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CHARLESTOWN.

FARMERS' BANK v. WILLIS.

|    |     |
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| 7  | 31  |
| 62 | 438 |

August 22, 1873.

1. The court may judicially recognize or inform itself as to the charter of the Farmers' Bank of Virginia, or other like bank, and as to its organization and acceptance of a provision for the extension of its existence. 1873.  
August Term.
2. The Bank had the right to assign its assets for the benefit of its creditors, independently of the act of the General Assembly of Virginia, passed in 1866, on that subject.
3. The deed made in 1867, by the Bank, when hopelessly insolvent, for the transfer of its assets to trustees for the payment of specific liens, and then, as far as adequate, for the payment of all its other debts, was valid and effectual for that purpose.

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4. The provision in the Code of Virginia, that, "though a bank had a branch \* \* \* all its notes should be received in payment of debts to the bank, whether contracted at the parent bank, or a branch," applied only while the debts remained due to the bank. When a negotiable promissory note discounted by the Farmers' Bank of Virginia had been assigned by the Bank to trustees, for the payment of antecedent debts, and the maker, having notice of the assignment, afterwards acquired notes of the Bank, he could not, with these, pay his debt so assigned, or set them off against it.
5. When "The Farmers' Bank of Virginia," by that name, brought suit, and the defendants made no objection, on that account, but pleaded in bar, and agreed the facts, using that name, and the "President, Directors and Company of the Farmers' Bank of Virginia," indiscriminately, as the name of the same corporation, and submitted the case to the court, which gave judgment in favor of the Bank; the defendants, who appealed, cannot, in this court object successfully to the name in which the suit was brought.
6. A judgment having been entered for a larger amount than the facts agreed warranted, and subsequently, on motion of the plaintiff in whose favor the error was committed, and without notice, the error was corrected; the defendants, for whose benefit the correction was made, cannot for that reason, appeal or obtain a reversal of the judgment.
7. When, after the Farmers' Bank of Virginia had assigned its assets to trustees for its creditors, of which a debtor had notice, he acquired and tendered notes of the Bank in payment of his debt before the passage of the act in 1873, which provides that debts due to the banks or their trustee or representatives, may be paid in the issue of the banks or their branches, the tender cannot now by force of the statute, be treated as a payment. And a judgment rendered then, which was correct, should not now be reversed, to enable the debtor to make the payment, or otherwise have the benefit of the legislation. If he could pay the debt in that manner, without the judgment, he can pay it notwithstanding the judgment. Whether he can do this, is not now decided.

This was an appeal, by the defendants below, from a judgment of the circuit court of Jefferson county, rendered at the April term, 1869, thereof, in a suit therein pending, wherein the Farmers' Bank of Virginia, suing for the use of J. M. Goddin and Samuel Robinson, assignees and trustees, was plaintiff, and Thomas H. Willis and R. B. Washington, were defendants. The

Hon. Joseph A. Chapline, then judge of said circuit court, <sup>1873.</sup> <sup>August Term.</sup> presided at the trial of the cause below.

The opinion of Hoffman, Judge, contains a sufficient statement of the facts, and recital of the statutes therein referred to.

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*William H. Travers, George H. Lee and Cooke & Kennedy* for the appellant.

*Charles J. Faulkner* for the appellee.

HOFFMAN, JUDGE :

In the year 1812, it was enacted by the General Assembly of Virginia, (Acts 1811-12, ch. 7—2 R. C. 1819, ch. 196, secs. 1, 2, 5, 9, 11, 15, 20,) that the Farmers' Bank of Virginia should be established in the city of Richmond, with a capital stock of two million dollars, divided into twenty thousand shares of one hundred dollars each :

That there should be appropriated to the use of the Commonwealth three thousand three hundred and thirty-four of these shares : That books of subscription should be opened in Richmond, Norfolk, Lynchburg, Winchester, Fredericksburg and Staunton, under the superintendence of numerous persons, for the shares that were authorized to be subscribed at each of these places : That the subscribers should be a corporation, in law and fact, by the name of The President, Directors, and Company of the Farmers' Bank of Virginia, and should so continue till the first day of June, in the year 1827 : That there should be directors for the Bank at Richmond, and for a branch at each of the other places before named, who should be citizens of Virginia, and should be elected annually, a part of them by the General Assembly and a part by the stockholders :

That the General Assembly should be furnished, annually, if it should require it, with statements of the amount of the capital stock of the corporation, debts due to it, money deposited therein, notes in circulation and cash on hand ;

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and should have the right to inspect the general accounts in the books of the Bank, that related to such statements :

That the directors of the Bank at Richmond should establish offices at Lynchburg, Winchester, Norfolk, Petersburg and Fredericksburg; for the purpose of discount and deposit upon the same terms and in the same manner as should be practiced at the Bank ; and that the capital stock should be distributed in the proportions specified.

In the year 1837, (Acts 1836-7, ch. 183, secs. 4-13), it was enacted that the President and Directors of the Farmers' Bank of Virginia should have authority to increase the capital stock of the Bank, by the addition of a million and ten thousand dollars, of which the Commonwealth should subscribe and hold one-half; and that the increase should be distributed among the Bank at Richmond and its branches, as by the act directed :

That, within six months after the new stock should be raised, offices of discount and deposit should be opened at Farmville, Scottsville and Abingdon, or Evansham.

Subsequently, at different times, by various acts, it was enacted that the charter of the Bank, with modifications, should be extended to the 1st day of June, 1842; and afterwards, with further modifications, and conditions, till the 1st of April, 1857; and thence for six years :

That the capital stock of the Bank might be increased and branches established at a number of other places in different parts of the Commonwealth.

And, accordingly, at different times the Bank at Richmond, and branches at Norfolk, Petersburg, Fredericksburg, Lynchburg, Winchester, Danville, Farmville, Charlottesville, Wytheville, Alexandria, Lewisburg and Blacksburg were organized and put and continued in operation.

It was enacted that the moneys of the Commonwealth should be deposited in the Farmers' Bank of Virginia and two other banks mentioned, a third part in each :

That the Governor should appoint a number of directors but one less than half of all, of each of the banks and branches in the State: And that the notes of these and other banks should be received in payment of taxes and debts due to the Commonwealth:

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That the Board of Directors should quarterly transmit to the Governor a statement of the condition of the banks, which should be published in newspapers in the cities and counties where the banks and branches were situated: And that the Governor should cause to be prepared and submitted to the General Assembly, at each session, with the reports of the banks, a tabular statement as to each bank.

And it was enacted, and accepted, that the bank should pay to the Commonwealth a bonus out of each semi-annual dividend.

In the year 1861, (Acts 1861, ch. 58,) by an amendment to the last previous act, which extended the charter of the Farmers' Bank, it was enacted that the charter should be extended from the first day of April 1863, for twenty years; and the Bank was invested with all the rights, powers and privileges, and made subject to all regulations imposed by the 56th, 57th and 58th chapters of the Code of Virginia, and the act to amend the 10th section of chapter 57 thereof, passed April 9, 1853, so far as the same might be applicable to banks of circulation, and to all the rights and liabilities that had accrued under an act to separate the State from the banks, passed March 18, 1856: That the act should commence and be in force on and after the 1st day of April, 1863; *provided*, it should have been approved by the stockholders in the Bank, at any time before the first day of February, 1862, and the approval should have been certified by the president and cashier of the Bank, under its corporate seal, to the Governor of the Commonwealth.

On the 6th day of June, in the year 1861, Willis made a note in writing, of that date, and delivered it to Wash-

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ington, whereby Willis, for value received, promised to pay to Washington, or order, sixty days after the date thereof, the sum of \$2,500, negotiable and payable at the office of discount and deposit of the Farmers' Bank of Virginia, at Winchester: And, before the maturity of the note, Washington endorsed and delivered it to the Bank at its office at Winchester, for the accommodation of Willis, and it was by the Bank then discounted. When the note became due and payable, it was presented for payment, but was not paid: Whereupon, it was protested for non-payment, and notice of dishonor given to the endorser.

On the 27th day of February, 1867, the defendant paid \$500, and on the 27th day of March, 1866, paid \$412, upon the note.

On the 20th day of February, in the year 1866, it was recited by the General Assembly of Virginia, (Acts 1866, ch. 95,) that the banks of the Commonwealth, during the progress of the war then recently waged in the State, sustained such losses that they were unable to promptly pay their liabilities; and that it was the sense of the General Assembly, that a speedy settlement of the affairs of the banks should be made, in order to a legal and proper distribution of their assets among all persons entitled to share in them:

And, therefore, it was enacted that it should be lawful for the president and directors of any bank of circulation, created by the General Assembly, to make or cause to be made, a deed conveying to such person or persons as the president and directors might select, all the assets, real and personal, of such bank, providing in the deed, that the proceeds of the assets should be distributed among all persons entitled to share in the distribution, according to the legal rights and priorities of such persons, at the time the deed should be executed:

That whenever any creditor of such a bank should by any suit, or other legal proceeding, seek to obtain a judgment, decree or order that, when rendered or made,

would create a lien in his favor, upon the assets of the bank, or any portion of them, and entitle the creditor to receive more than his just and ratable share in the distribution of the proceeds of the assets, then, in order to preserve the rights of all the creditors to a fair *pro rata* distribution of the assets, and, for the purpose of effecting such distribution, it should be the duty of the president and directors of the bank, and they were required, to make such deed as before mentioned :

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And that it should be the duty of the banks or their legal representatives, on the first day of April, and quarterly thereafter, until final liquidation, to publish in a public newspaper, nearest their location, a statement, under oath, of their condition, and to make distribution of the assets on hand, according to the provisions already stated, so far as it could be done consistently with the interests of all the creditors of the bank : But that nothing in the act should compel the president and directors or trustees, to make a final distribution before the expiration of three years next after the passage of the act.

On the 19th day of January, in the year 1867, the President, Directors and Company of the Farmers' Bank of Virginia, made a deed in which they recited the first provision of the act passed in the previous year, as already set forth ; and that the President and Directors deemed it expedient and proper that a deed conveying all the assets of the Bank for the purposes in the act mentioned, should be made : And, therefore, in consideration of the premises, granted and assigned to John M. Goddin and Samuel Robinson, of the city of Richmond, all the assets, real and personal, of the Bank, wherever situated, including all lands and lots, office furniture and other personal chattels, current money, debts and choses in action, stocks, bonds and certificates of debt, bills, notes, accounts and other evidences of debt and securities therefor, and all other property,



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whether real or personal, belonging or due to the President, Directors and Company, or to which they or the Bank were entitled: Upon trust, however, that the parties of the second part, or the survivor of them, should proceed without delay, to convert into current money, all the assets of the Bank thereby granted and assigned, not already in that form, by collecting the debts and choses in action; using the name of the Bank in suits for that purpose, when proper only; selling, transferring and assigning the debts and choses in action, or any of them, and selling the other property: And the proceeds of the assets, after deducting all costs and expenses of executing the trust and paying all the salaries due the officers of the bank, and reasonable fees and compensation for other services rendered the Bank while its general operations were suspended, apply to the redemption of the outstanding circulation or notes of the Bank, ratably among the holders who should present them to the trustees for redemption within six months after publication of notice by the trustees, in two or more newspapers printed in the city of Richmond, calling on the holders to present them; but so that none of the note holders who had theretofore received any partial payment on account of notes held by them should be entitled to any further payment until all other note holders presenting notes to the trustees for redemption should have received a payment equal to that received by the others; and the residue of the proceeds, if any, apply to the satisfaction of all outstanding debts and liabilities: Provided, however, that if, according to the proper legal construction of the act of the 12th day of February, 1866, a ratable distribution among all the creditors of the Bank not having specific liens on its property, be required, then the trustees to apply and distribute the proceeds of the assets according to the requirements of the act.

The deed was acknowledged on behalf of the Bank, and recorded, and Willis and Washington had notice of it.

After such notice, Willis and Washington procured notes of the bank, and on the 5th day of May, 1867, tendered these notes to the amount of \$2,323.47, the residue of the debt and interest due by the note and costs of protest, to the Bank, at its office at Winchester; but the Bank refused to receive them.

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On the 25th day of July, in the year 1868, an action of debt in the name of the Farmers' Bank of Virginia, for the use of Goddin and Robinson, assignees and trustees, was brought in the circuit court of the county of Jefferson, against Willis and Washington, and at rules in that month a declaration was filed, in which was demanded the sum of \$2,500, for which Willis made the note payable to Washington at the office of the Farmers' Bank, at Winchester, endorsed by him, and discounted at that office, with interest and notarial charges.

At the next August term of the court, the defendants pleaded that they did not owe to the plaintiff the residue of the sum demanded, except \$2,323.47; and that at the time when the last mentioned sum became due and payable, they had been, and were, ready to pay to the plaintiff; the sum just mentioned, at the office of discount and deposit of the Farmers' Bank of Virginia, at Winchester; and that when it became due, before the commencement of the suit, to-wit: on the 5th day of May, 1867, at the office at Winchester, they were ready and willing, and tendered and offered to pay to the plaintiff, the sum mentioned, but the plaintiff refused to receive it; and the defendants—as they alleged—brought the sum so tendered into court, ready to be paid to the plaintiff, if it would accept it. And the defendants in fact did bring into court and file notes of the Farmers' Bank, amounting to the sum of \$2,766, which were, by the order of the court, deposited with the clerk thereof. And the plaintiff demurred to the plea, and the defendants joined in the demurrer.

The defendants likewise pleaded payment, and notified the plaintiff that, at the trial, they would rely on,

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as set-offs, notes of the Farmers' Bank of Virginia, signed by the President and countersigned by the Cashier of the Bank, payable to the bearer, amounting to \$2,334, and payments of \$500, made 27th of February, 1862, and \$412, made 27th of March, 1866.

And the parties joined issue on the plea.

And the plaintiff agreed that the defendants might give in evidence any matter that could be proved under any special plea in bar, good in law.

And the parties agreed the facts and waived a trial by jury, and agreed that the court should enter judgment according to the very right of the case.

The facts agreed are those already stated, relative to the making, endorsement, discount and dishonor of the note of \$2,500, and notice thereof; payment of \$500 and \$412; the act of the General Assembly of Virginia, passed 12th of February, 1866; the execution of the deed made by the President, Directors and Company of the Bank, and the acknowledgment and recordation of the deed, and notice to Willis and Washington thereof, before the acquisition of the note of the Bank; the tender of such notes to the amount of \$2,323.47; and the refusal to receive them in payment, and the bringing them into court; and the identity of the notes with those brought into court.

At the April term, in the year 1869, the court, upon the issue and facts, reciting that the notes of the Bank were acquired by the defendants after the assignment by the Bank, with notice thereof; considered that the plaintiff recover against the defendants the sum of \$2,085.63, with interest from the 27th of February, 1862, till paid, and costs.

On the 24th of July, 1869, the defendants took an appeal from the judgment.

At the September term of the court, in the year 1871, the Bank, for the use of Goddin and Robinson, its trustees, appeared by its attorney, and acknowledged that

there was an error in the judgment rendered at the April term, 1869, in this, that there was an omission to credit the defendants with the payment of \$412, made on the 27th March, 1866, admitted in the case agreed, and that the judgment should have been for the sum of \$2,-323.47, as set forth in the plea, with interest from the 5th May, 1867, and not for the sum of \$2,085.63, with interest from the 27th February, 1862; And, therefore, at the request of the plaintiff, it was ordered that the correction and amendment be made, and the judgment be regarded as rendered for the sum of \$2,323.47, with interest from the 5th of May, 1867.

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In the present year, 1873, some years after the assignment made by the Farmers' Bank to trustees for creditors, and after the rendition of the judgment and taking of the appeal in this case, it was enacted by the Legislature of this State, (Acts 1872-3, ch. 40,) that debts, whether by judgment, execution, or of any other character, due the banks of Virginia, or of this State, or their branches prior to the 5th day of April, 1865, or their agents, trustees or representatives, may be paid in the issue of such banks, or their branches, for circulation.

It is argued, by the counsel for the defendants, that the Farmers' Bank expired on the 1st day of April, 1863, and consequently, that it had no capacity to make the deed dated the 19th January, 1867.

We have information outside the case in judgment, that before the time limited by the act passed in 1861, the Farmers' Bank, in general meeting of the stockholders, did approve the provisions of the act, and the President did certify the approval to the Governor, in fact, of that part of the Commonwealth in which the Bank was situated; and that after the 1st day of April, 1863, the Bank continued to do business.

It needs but a slight glance at the legislation relative to the Farmers' Bank, and other banks of like charac-

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acter, and little knowledge of their operations, to understand that their action materially influenced the finances and business of the Commonwealth and affected every class of her citizens. Public officers and private persons alike had the interest and the means to ascertain their condition and operation.

Accordingly, it was held by the Court of Appeals of Virginia in the case of *Stribling v. The Bank of the Valley*, 5 Rand, 132, and *Hays v. The Northwestern Bank*, 9 Gratt. 127, that the acts of the General Assembly incorporating these banks were public acts, of which the courts would take notice. The charter of the North Western Bank was twice extended, upon condition of acceptance, before the case of *Hays v. The Bank* arose: Yet the action was sustained without admission or proof of the creation or extension of the Bank. So that, though this was not mentioned, it was decided by implication, not only that the court should take judicial cognizance of the original organization of the Bank, but likewise the acceptance, by the latter, of the act for the extension of the charter.

And it was held by the Supreme Court of Appeals of this State, in the case of *The Farmers' Bank of Virginia v. Gettinger*, 4 W. Va. 305, that the Bank is, in this State, a domestic corporation.

But the consideration whether we can judicially know or inform ourselves, as to the acceptance by the Farmers' Bank of the provisions of the act to extend its charter, or its continuing to do business after the expiration of its former charter, before or after the erection of this State, is not indispensable to the adjudication of this case.

At the revision of the Code of this State in 1868, it was provided, (ch. 13, sec. 4), that whenever, in any case, it becomes material to ascertain what the law, statutory or other, of another State or country, or of the United States, is, or was, at any time, the court, judge, or mag-

istrate, shall take judicial notice thereof, and may consult any printed books purporting to contain, state, or explain the same, and consider any testimony, information or argument that is offered or before the court, on the subject.

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Under this provision, we may, without hesitation, recognize the act of the General Assembly of Virginia, passed in 1866, the pertinent provisions of which, if any be material here, have been recited.

It was agreed in this case, that on the 17th day of January, 1867, the President, Directors and Company of the Farmers' Bank of Virginia, executed the deed which is set forth. "The President, Directors and Company of the Farmers' Bank of Virginia," is the full and exact name of the corporation: And the fact that the Bank executed the deed implies that the corporation existed and retained the capacity to make the deed effectually.

Not only this special instance, but the general tenor of the facts agreed, indicates that the Bank existed and acted till the execution of the deed.

The Bank had, unquestionably, the right to assign its assets for the benefit of its creditors, independently of the act of the General Assembly of Virginia, on that subject. Burrill on Assignments, pp. 602-624; Abbott's Digest Law of Corporations, pp. 43-46; and numerous cases cited in these books.

The act and deed in question have both been construed and sustained by the supreme court of appeals of Virginia.

In the case brought by *Gardiner and others against the President, Directors and Company of the Farmers' Bank*, in March, 1867, soon after the execution of the deed, from the decree in which Gardiner and others appealed, (18 Gratt., 509,) Judge Joynes, pronouncing the opinion of the court, said:

"The events of the late war reduced all the banks of circulation in the State to a condition of utter and hope-

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less insolvency. They suspended business from necessity, and there was no possibility of a resumption. It only remained to wind them up, and to distribute among their creditors such remnants of their assets as might be realized. In this condition of things, and to accomplish this object effectually and upon equitable terms, the act of February 12, 1866, was passed. It is entitled, 'An act requiring the banks of this Commonwealth to go into liquidation.' It proceeded, however, upon the assumption, that the banks were already in a course of liquidation, forced upon them by the calamities of the war, and its purpose was to provide regulations by which, as recited in the preamble, 'a speedy settlement of the affairs of said banks should be made, in order to a legal and proper distribution of their assets amongst all persons entitled to share in such distribution.'

"The first section of the act plainly contemplates that the deed shall recognize and respect existing priorities, which neither the bank nor the Legislature could destroy or impair; but it gave no authority to create new ones.

"The second section in effect declares, that each creditor of the bank is entitled to his 'ratable share' in 'a fair *pro rata* distribution' of the assets of the bank, and plainly implies that such is to be the rule of distribution in case no deed shall be made. The deed is required to be made only when it shall become necessary to prevent a disturbance of this rule of distribution; the object of the deed is not to establish the rule, but to 'preserve' it.

"I have already shown that the establishment of a general rule of distribution, which could not be defeated or disregarded by the banks, was no invasion of their rights. And it was eminently just and proper. Among creditors having no legal priorities, equality was equity. The banks had ceased to exist for the purposes for which they were created. A resumption of their operations as banks was impossible. The stockholders had no longer

any interest in them. It only remained to wind them up for the benefit of their creditors.

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"It remains to enquire, whether the noteholders were entitled to priority over depositors or other general creditors. They had no lien, and therefore no priority at law. Nor is there any rule of equity upon which they could claim priority. It was so held by the Supreme Court of Massachusetts in *Stockholders of Cochrane Bank v. Colt*, 1 Gray (Mass.) 382."

In the cases of the *Exchange Bank of Virginia*, for the benefit of *Crump, Trustee v. Knox*, and *The Farmers' Bank of Virginia*, for the benefit of *Goddin and Robinson, Trustees v. Anderson & Co.*, 19 Gratt., 739, Judge Christian, pronouncing the opinion of the court, said substantially the same thing.

According to these decisions, the specific provisions in the deed give place to the proviso that, if, according to the proper legal construction of the act, a ratable distribution among all the creditors of the bank not having specific liens be required, then the trustees shall distribute the proceeds according to the requirements of the act.

The effect of the deed is to provide for the distribution of the assets not subject to specific liens, among the creditors generally.

The promissory note in question in this case was payable and discounted, and the deed of assignment was made in Virginia. The Bank and office of discount and deposit were situated, and, as appears by the deed, Goddin and Robinson, the assignees in trust for the creditors resided, in that state. Whether Willis and Washington were citizens or residents of Virginia or West Virginia, or either, when the note was made and endorsed, when the act was passed, or when the deed was made, is not shown. It certainly cannot be inferred from anything in the case that they resided in this State at the time of the passage of the act of 1866, or the execution of the deed, or at any time previous to the institution of the suit. But this is not deemed material.



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We think the act of the General Assembly, as construed by the supreme court of Virginia, embodies what was the law before, with convenient additional regulations; that the law was just and expedient, and, as far as pertinent, furnishes the rule for the adjudication of this and like cases, in this State. And we think the deed was valid and sufficient to effect the transfer of the promissory note in question, and other assets of the Bank, to the trustees for the payment, ratably, as far as adequate, of the debts of the Bank.

The defence made by the pleas, is urged here as sufficient. It is argued that by the legislation on the subject, bills of exchange, promissory notes or other debts at any time due the bank, though assigned to a trustee for the payment of creditors ratably, may, nevertheless, be paid or set off by notes of the bank, however depreciated, procured by the debtor of the bank after notice of the assignment.

The statutory provisions relied on to sustain this position are incorporated in the Code of 1849, (ch. 58, sec. 11. ch. 144, sec. 7; copied in the Code of 1860, same ch. secs. 16, of the former and 7 of the latter.) They are as follows:

"Though a bank have a branch, all its notes shall be signed by the president and countersigned by the cashier of the parent bank. All such notes shall be received in payment of debts due to the bank, whether contracted at the parent bank or a branch."

"Every promissory note, or check for money, payable in this State at a particular bank, or at a particular office thereof, for discount and deposit, or at the place of business of a savings institution or savings bank, and every inland bill of exchange, payable in this State, shall be deemed negotiable."

These provisions should be construed together, so that the one shall not disappoint the purpose or impede the more important operation of the other.

One of the ordinary rights of a bank or other corporation, as a legally constituted artificial person, is to dispose of its effects. 1873.  
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This is expressed in the charter of the Farmers' Bank. Generally, a bank may convey or transfer its property in possession, or choses in action, either for a new consideration, or to satisfy or secure a pre-existing debt. When a bank is insolvent, or in danger of insolvency, the just principle of equality in part payment of creditors, alike entitled to satisfaction, suggests not only the legal right, but the moral duty of an assignment, or other measure, to secure and effect a ratable distribution of its assets among such creditors. When the assignment is to trustees to secure antecedent debts, these constitute a valuable consideration entirely adequate to sustain the assignment, which becomes completely effectual to protect the creditors against demands thereafter acquired by any one. *Wickham and Goshorn v. Martin & Co.*, 13 Gratt. 427; *Evans, Trustee, v. Greenhow*, 15 Gratt., 153.

It is important, not only to banks, but to all persons to whom bills of exchange and promissory notes held by a bank may be endorsed, or in any manner transferred, that, according to the contract, interpreted by the mercantile law generally applicable to the subject, they be payable to the holder in money, without condition or defalcation, and without extinguishment, in whole or in part, by the set-off of demands against the bank acquired after delivery or notice of the assignment.

The construction of the law in question, urged by counsel, would make any bill of exchange or promissory note payable at the bank, or once held by it, in fact payable, not in money without defalcation, but in depreciated, and, perhaps worthless currency, and thus destroy one of the distinguishing and most important characteristics of negotiable paper; it would make it necessary for whoever would purchase or receive in payment any such note or bill, to learn the entire financial condition of the

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bank; and ascertain the market value of its notes issued for circulation, in order to ascertain the actual value of the bill of exchange or promissory note sought to be negotiated; it would make assignments of such bills or notes, for the ratable payment of the debts of the bank, to a greater or less extent unavailing; while it would enable calculating speculators, who received gold or its equivalent, in consideration of their bills or notes made or endorsed to the bank, even after notice of endorsement to a holder who paid full value for it, or after an assignment for the payment of debts, to purchase or procure the depreciated currency of the bank, at any price, however inconsiderable, and with this to pay the debt in the hands of the endorsee or the trustee for creditors.

We do not believe the legislation on this subject was intended, or should be construed to have such effect.

We think the provision in question, that all "notes shall be received in payment of debts to the bank," applies only while the debts remain due and payable to the bank. When they have been endorsed or assigned and the title has passed from the bank to another holder or owner, they are no longer debts to the bank or payable in the notes of the bank, or subject to extinguishment by the set-off of notes, unless the latter were acquired by the debtor before endorsement and delivery or assignment of the bills of exchange or promissory notes, and notice thereof to him.

This subject has been fully discussed and carefully considered, and the questions involved in this case decided by the supreme court of appeals of Virginia, in two late cases.

In *The Exchange Bank of Virginia, for the benefit of Crump, Trustee, v. Knox, &c.*, and *The Farmers' Bank of Virginia, for the benefit of Goddin and Robinson, Trustees, v. Anderson & Co.*, 19 Gratt., 339, Judge Christian, pronouncing the opinion of the court, said:

"When, in conformity with the act of February, 1866, these banks executed their respective deeds of assign-

ment, they had ceased to exist for the purposes for which they were created. A resumption of their operations as banks was simply impossible. The stockholders had no longer any interest in them. It only remained to wind them up for the benefit of their creditors. *Robinson v. Gardiner*, (*supra*). In this view, the grantees in said deeds were not trustees for the banks, but for the creditors only. *Haxton v. Bishop*, 3 Wend. 18; *Diven v. Phelps*, 34 Barb. 224. The true principle, I conceive to be this: These corporations being insolvent, under the statute, and the deeds made in pursuance thereof, the rights of *all the creditors* attach equally, to *all their assets*, and whoever takes their bills afterwards (being indebted to such corporations,) takes them subject to this right of all the creditors to share equally in their assets. His claim is upon the assets for his proportionate share. The statute, as well as the deeds of assignment, virtually secures to the creditors collectively, the entire and exclusive right to all the assets. The debtor, therefore, must pay his debt, and take *his dividend* for his claim, arising from his ownership of the bills, acquired under such circumstances. It is true that a bank, as long as it is solvent, or rather, as long as it has control of its assets, is bound to take its own bills in payment of debts due to it; but when it becomes insolvent, and goes into liquidation, making an assignment of all its assets for the benefit of its creditors, the rights of all its creditors attach equally, and a debtor then takes the bills of the bank subject to the rights of other creditors to enforce his obligations against him for the equal benefit of all. *Diven v. Phelps*, 34 Barb. 224; 9 Cowen 413, notes; 1 Paige Ch. 585; 3 Wend. 13. But independently of the act of 12th February, 1866, the obligations enforced and the rights established under it, according to the construction I have given it, it must be conceded on general principles, that these notes of the banks, acquired *after* notice of the assignment, cannot be pleaded as set-offs in ac-

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tions brought by the assignees of the banks, unless these cases are taken out of the operation of the general and well settled principles of law, in consequence of the provisions of the charters of these corporations, or of the general law regulating them. To this question I shall advert presently.

"It is a principle of law, too well settled to admit of doubt or argument now, that a set-off, as between original parties, acquired after the assignment, for a *bona fide* purpose, of the subject in controversy, and notice thereof, cannot be set-off against a holder for value. 13 Johnson, 322; 1. Johns. Ca. 51; 5 Munf. 388; 14 Gratt. 1.

"It is equally well settled that the trustees and beneficiaries in a deed of trust to secure *bona fide* debts, are purchasers for valuable consideration. A pre-existing debt is of itself a valuable consideration for a deed of trust executed for its security.

"As between the banks and the bill-holders, the law does make a contract that the bank shall receive its own notes in payment of a debt due to it by the bill-holder; but it must be a *debt due to the bank*, and when assigned to a third party *for value*, it is then a debt due to the assignee, and not to the bank, and there is no obligation on the assignee to receive the notes of the bank, but the debt must be paid as other debts are paid. The truth is, that these provisions of the statute are, as before illustrated, simply *laws regulating the payment at the parent banks and branch banks respectively* of debts '*due to any or either of them*, and cannot be said to constitute a contract binding upon every party who may be the assignee or endorsee of the debt originally due to the bank.

"I have carefully examined the decisions of the courts of other states to ascertain what has been the ruling of these courts on this question, and I find that, with a single exception, (if that, indeed, can be considered an exception,) the whole *current* of decisions has been in one direction, to-wit: that the assignees of a bank are not obliged to take from the debtor the notes of the bank

obtained after notice of the assignment. This has been the uniform course of decision in New York; See 3 Wend. 13; 1 Paige Ch. 585; 1 Law Reg. N.S. 238; 3 Barb. 224. The courts of Pennsylvania have decided the same way; 8 Watts and Serg. 311; *Housum v. Rogers*, 40 Pa. St. 190. So in Ohio; 1 Ohio, 381, 376; 3 McLean, 397. So in Kentucky; 16 B. Mon. 351; 1 Duval, 84: And in Mississippi; *King v. Elliott*, 5 Smedes and Marsh., 428."

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In the case of *Saunders v. White*, 20 Gratt., 327, these principles were re-affirmed.

It was held by the Supreme Court of Appeals of this State, in the case of the *Farmers' Bank v. Gettinger*, 4 W. Va., 305, that a debtor of a bank, summoned as a garnishee, could not afterwards procure the notes of the bank and pay them or set them off, in satisfaction or discharge of the debt. We cannot see that the right of the assignee in trust for creditors is inferior to that of an attaching creditor.

It is argued that the action could not be maintained in the name of the "Farmers' Bank of Virginia," and that this objection may now be made here.

The act for the charter of the bank is entitled, "An act incorporating the Farmers' Bank of Virginia." In the first section of the act it is provided "that a bank shall be established in the city of Richmond, to be called the 'Farmers' Bank of Virginia.'" Though, in the ninth section, it is provided that the subscribers, their successors and assigns, shall be, and they were, by the act, made a corporation and body politic, in law and fact, by the name and style of the "President, Directors and Company of the Farmers' Bank of Virginia." From the creation of the Bank to the present time, in acts of the General Assembly, and in opinions of the courts, as well as in other documents and ordinary conversation, the corporation has generally been mentioned by the former name. In the title and body of the last act extending its charter, it is designated thus, and not

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otherwise. Throughout the States of Virginia and West Virginia, the Bank has been, and is commonly known by that name.

The defendants made no objection in the circuit court because of the name in which the suit was brought: They pleaded in bar, agreed the facts, treating "Farmers' Bank of Virginia," and the "President, Directors and Company of the Farmers' Bank of Virginia," indiscriminately, as the name of the same corporation; and, finally, submitted the case to the decision of the court. Clearly, the defendants, who appeal, cannot urge this objection, successfully, here.—3 Rob. Pr., 339, and authorities there cited; 12 Leigh, 91, and authorities there cited.

It is argued that the judgment having been entered for a larger amount than the agreement of facts warranted, the order of the circuit court correcting the error must be disregarded, and the original judgment, without the amendment, must be considered and reversed.

It is provided in the Code, chapter 134, section 5, among other things, that the court, in which is rendered a judgment, wherein there is any mistake or miscalculation of any sum or quantity, when it is right in any part of the record or proceedings, or when there is any verdict, report of a commissioner or other writing, whereby the judgment or decree may be safely amended, may, on the motion of any party, amend the judgment according to the truth or justice of the case:

It is further provided, that any motion under this section, shall be after reasonable notice to the opposite party, his agent or attorney.

Under this section, the court has jurisdiction, by reference to the agreement of facts, to correct the error. There was no notice of a motion, but it was made by the plaintiff in whose favor the error was committed. The plaintiff, then, could not appeal from, or complain of, the order made on his own motion. The correction was for the benefit of the defendants, who are the appellants

here. If they had been prejudiced, by the order of amendment, they might have appealed; but they were not prejudiced, and, therefore, have not, and could not have, appealed.

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And, finally, reference is made, by the counsel, to the act passed this year, providing that debts, by judgment or otherwise, due to the banks of Virginia, or this State, or their trustees or representatives, may be paid in the issue of the banks or their branches; but no suggestion is made as to what is the effect of the act, or how it can influence the decision of this case.

The notes of the Farmers' Bank were, by the holders, merely tendered before the action was brought; and, afterwards, during its pendency, were, by the defendants, brought into court and filed, and, at their instance, by the court, ordered to be deposited with the clerk. This was entirely ineffectual for the purpose intended. It was neither a legal payment, set off, or anything equivalent to the one or the other. As it did not then constitute a payment, it cannot now be treated as such. At the time of the decision of the court against the validity of the tender, or afterward, the defendants had the right, upon leave, to withdraw the notes, and use them legitimately, as they thought proper. If they have not done so, they may still apply to the court, obtain the leave and withdraw the notes; and use or dispose of them in any manner that they might do if they had not filed them in the case. But whether, under the late legislation, they may pay their debt assigned to the trustees for creditors, with these notes, acquired after notice of the assignment, and thus discharge the judgment, need not be considered.

For the reasons stated the judgment of the circuit court, as corrected, is affirmed, with damages and costs.

The other Judges concurred.

JUDGMENT, AS CORRECTED, AFFIRMED.



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## RODERICK v. THE RAILROAD COMPANY.

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1. When the plaintiff files an amended declaration, which is complete in itself, and does not refer to, or in any manner adopt the former as part of the same, and to which amended declaration defendant replies and issue is joined thereon, the former shall be considered as withdrawn or abandoned.
2. A plea filed to the first declaration, but not withdrawn, will be regarded as filed to the second declaration.
3. A new trial will not be granted after verdict, because the amount of damages assessed by the verdict exceeds the amount claimed in the writ, but not the amount laid in the declaration.
4. A new trial will be granted on the affidavit of a party, or of some other person, on the ground of newly discovered testimony, when the affiant shows that he has conversed with the witnesses, and details the testimony which they will give, and the court sees that it is not cumulative, and if before a jury would produce a different verdict; and where such testimony was unknown to the plaintiff and he had used due and proper diligence to procure it.
5. A common carrier will not be liable for injury to a horse, occasioned by the improper or unwarrantable interference of the plaintiff or his agent, with the management of the car, by the servants or employees of the company.

This was an appeal, by the plaintiff below, from the judgment of the circuit court of Jefferson county, rendered at the August term, 1868, of said court, wherein Hezekiah Roderick, was plaintiff, and the Baltimore and Ohio Railroad Company, defendant. The Hon. Ephraim

B. Hall, judge of said circuit court, as organized under the Constitution of 1863, presided at the trial below.

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The facts are sufficiently stated in the opinion of the Court, delivered by Paull, Judge.

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*Charles J. Faulkner*, for appellant.

*George H. Lee*, for appellee.

PAULL, Judge :

In 1865, an action was instituted by the plaintiff, Hezekiah Roderick, against the defendant, in the circuit court of Jefferson county, for injuries received by a horse of the plaintiff, while in the course of transportation from Harper's Ferry to Baltimore. A declaration in case was filed, and a common order taken and confirmed. At the April term of the court, leave was given to the plaintiff to file an amended declaration, during the term. No record or entry, made by the clerk, indicates that this amended declaration was filed; but a declaration in assumpsit appears in the printed record, and from affidavits found therein, it appears that this declaration was filed; and from a manuscript record, it appears that the plea of non-assumpsit was filed to this declaration, and plaintiff replied generally and issue was joined thereon. This amended declaration is complete in itself, and does not purport to be filed merely as an additional count to the former; nor is the former in any way adopted by, or made part of, the same; and the amended declaration is, as before stated, in assumpsit, while the former is in case. In this state of the pleadings, the former declaration may be regarded as withdrawn or abandoned. This last, or amended, declaration claims damages to the amount of \$1,900. On the pleadings and issue thus made, a jury was impanelled and a trial had, at the October term, 1866, in which a verdict was rendered for the plaintiff for \$1,500—and judgment rendered. At the same term, the defendant moved the court to set aside the verdict and judgment, on the grounds set forth

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in the record, and at the April term of the court, 1867, this was done, and a new trial awarded to the defendant; and, to this ruling of the court, the plaintiff excepted.

At the June term of the court, 1867, leave was given to the plaintiff to file, within forty days, an amended declaration. The record does not indicate, from any entry of the clerk, or from any other evidence, that this amended declaration was ever filed; or, if filed, does it appear that any other plea was filed in the cause, other than the plea of non-assumpsit, which had been filed to the second declaration.

At the April term, 1868, a jury was sworn, to try the issue joined between the parties, and rendered a verdict for the plaintiff for \$1,200. Whether this issue was made upon the first, or second, amended declaration, it is not necessary, or perhaps proper, in view of the subsequent proceedings and the opinion reached by this Court, now to determine. If it was the issue made under the pleadings in the former trial, there was no objection to it. If the second amended declaration was filed, the plea of non-assumpsit not being withdrawn, would stand as a plea to it; *Eppes Ex'or v. Demoville, Adm'r*, 2 Call, 22. In either case the parties were at issue on their pleadings; and even if the plea of non-assumpsit to the last declaration was informal, it is too late to take advantage of it after verdict; *Hunnicutt v. Carsley*, 1 H. & M., 153.

At the same term, (April, 1868,) a motion was made, by the defendant, to set aside this verdict and grant a new trial, for the reasons, or on the grounds, set forth in the record: *First*, because said verdict was contrary to the evidence; *Second*, because said verdict was contrary to law; *Third*, because said verdict was without evidence to support the same; *Fourth*, because said verdict was contrary to the instructions of the court; *Fifth*, because of newly discovered evidence.

At the August term, 1868, this motion was granted, and a new trial awarded; and, to this order of the Court,

the plaintiff excepted. The bill of exceptions sets forth the affidavits of A. B. Wood, in regard to newly discovered testimony, and the facts and evidence produced upon the trial.

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On the twenty-fourth day of July, 1869, notice was given and service of the same accepted by the defendant's counsel, that an appeal had been taken from an order of the circuit court granting a new trial in this cause, and on the same day a bond is filed by the plaintiff, the condition of which recites that the plaintiff has sued out an appeal "from an order of the circuit court of Jefferson county granting a new trial and setting aside the verdict of the jury" in this cause.

It is obvious that the appeal has not been taken from both orders of the court granting the two new trials, but from one only; and the plaintiff is entitled to have his appeal but from one order considered; from which order the appeal was taken is not indicated in any manner, and it is but natural and proper to infer, and to hold, that the appeal is from the order granting the last new trial, as with its result the plaintiff is satisfied, as well as with the former, and equally objected to the court interfering with the verdict. At all events, there can be no ground of complaint, as the plaintiff himself has failed to indicate from which order his appeal was designed to be taken.

Was there error in the court below in granting the last new trial, is the only question now remaining for determination. In support of the action of the court, it is suggested by the defendant's counsel, that as the amount of damages found by the verdict of the jury exceeds the amount claimed in the plaintiff's writ, that the variance is fatal, and is a sufficient ground for setting aside the verdict. This position, however, does not seem to be correct, when the *amount claimed in the declaration is sufficiently large to cover the amount found by the verdict*, and this is true in the present case; if the

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judgment was for more damages than are stated in the declaration, or the writ, it would be erroneous, but not when it is for less. *Moss v. Moss' Admr.*, 4 H. and M., 309, 310; 2 Wash. 203; 2 Tucker's Com. 314. In these books and cases, the doctrine would seem to be settled.

There are other grounds, however, for the order granting this new trial, which we proceed to notice. The first is that of newly discovered testimony. One of the questions arising upon the trial was the value of the plaintiff's horse, which had been injured. The affidavits of A. B. Wood, an agent for the defendant, are produced, in which he affirms that since the trial he had conversed with two different persons, one of whom had told him that the horse was not worth \$100 at the time of this shipment; that he knew the horse, &c., and that he was willing to testify to these facts; that he was informed by the other person that said horse was considered nearly, or quite, valueless; that he had been badly burned whilst on a train of cars in transportation from the south, &c.; that affiant had made diligent search for these facts before the trial; that he had diligently endeavored to find some testimony as to the value of the horse before the trial, but had been unable to do so, as the horse was almost unknown in the county. Such is the testimony of A. B. Wood, in his affidavits. Regarding the case of *Nuckols' Admr. v. Jones*, 8 Gratt. 267, as furnishing a proper rule upon this subject, and admitting that the courts should grant new trials on this ground with great care and caution, I think this case is fairly brought within the scope of the rule. The defendant asking the exercise of this power on the part of the court, shows ignorance of the existence of the evidence; that it was guilty of no negligence, and produces the affidavit of a party who had conversed with the witness whose evidence it was proposed to take; we think, moreover, that the new evidence, if before the jury, would have resulted in a different or modified verdict. Moreover, the evidence is not cumulative, as the record

discloses that no evidence whatever, on this question of value, was before the jury, on the part of the defendant. We think, therefore, that the circumstances here set forth fulfil the requirements of the rule. The affidavits of the parties, whose testimony it was proposed to take, appear in the record, and indicate that their testimony would not have been given, as stated in the affidavit of Wood, the agent of the Company: But these affidavits were not before the court below, when the order granting the new trial was made, and cannot, therefore, be considered by this court.

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Another ground on which this new trial was asked, is because the verdict was contrary to the law and evidence. The facts and evidence are found in the supplemental record in this cause. The testimony of five witnesses, (excluding the plaintiff's own,) is produced to sustain the issue on the part of the plaintiff. Hobart T. Lewis, the agent of the plaintiff in the shipping of this horse, is the only witness, on either side, who testifies as to the way the horse came to be injured, and his testimony on that point, is the following: "The horse fell out of the car from the door being open, about one mile this side of Mount Airy:" This is the whole testimony in this cause upon this point. The door of the car being open was the sole cause, or occasion of this horse being injured. It is true this witness Lewis objected to his being placed in what he calls a close house car, his only objection being that "it was too low, and the horse would likely strike his head." It may be here remarked that it appears from the testimony, that the Company did not know at the time this horse was taken on the car and during the course of transportation, that any other person than Lewis himself, was the owner of the horse. This same objection was made by the plaintiff who was present at the time, and who testifies as follows: "The horse was put in a low house car: I objected to the car, and told agent that it was not fit to put a horse in:" On the other hand is the testimony of four witnesses pro-

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duced by the Company, each of whom proves that he was in the Company's employment at the time of shipping this horse ; that it was their duty, in one capacity or another, to give attention to this shipment, and that the car was sound and in good condition, and suitable for the purpose for which it was used. There is no complaint in any quarter that there was not sufficient air, or ventilation ; the accident or injury was occasioned solely by the door of the car being left open ; the horse broke his halter and fell out. In the other end of the same car were two other horses belonging to different persons.

*Was, then, the door of the car left open by any fault, misconduct or negligence of the Company ?*

Perry Price, one of the Company's witness, states that he was dispatcher of trains at Harpers Ferry when this horse was shipped and remembers the fact ; "that it was his duty to see that the car doors were closed before the train started, and after the horse was put into the car ; that he went to the door to close it ; that Mr. Hobart Lewis, who shipped the horse, was in the car, and would not let him shut the door ; and said that he would take care of the horse himself, as he was of too much value to be shut up without some one to take care of him ; that witness would have closed the door, but for Lewis refusing and saying that he would take care of the horse ; when the car door is closed and fastened it cannot be opened from the inside." A. B. Wood testifies, that at this time he was dispatcher of trains at Sandy Hook yard ; that he also offered to close and fasten the door of this car, but was prevented by Lewis who was in the car. Thomas Michel was the conductor of this train ; and he testifies that he went to close and fasten the door of this car ; that the man in charge of the horse, who had a shipper's papers, refused to allow him to close the door, and wanted to take care of the horse himself ; that he would have closed the door but for that refusal and that Lewis was in the car." The testimony of these three witnesses, as to these material facts, as to the closing of

the car-door, is wholly unimpeached and uncontradicted in any way, even by Hobart Lewis himself. Upon this testimony, it is manifest beyond all doubt or controversy, that the injury to this horse was occasioned by the improper and unwarrantable interference of the plaintiff or his agent in the management of the car, by means of which the accident occurred; in other words, it was occasioned directly by the fault or misconduct of the plaintiff or his agent, whom he had put in charge of his animal, and of his transportation. Thus the acts of the plaintiff not merely contributed to, but actually occasioned, the accident which caused the injury of which the plaintiff complains, and for which, therefore, he is not entitled to recover. This position is in no conflict with the case of *Honnibal Railroad v. Swift*, 12 Wall. 262, cited by plaintiff's counsel, in which it was held, "It is not a ground for limiting the responsibility of a common carrier, where no interference is attempted with his control of the property carried, that the owner of the property accompanied it, and keeps watch for its safety." The Court say, in delivering the opinion: "The control and management of the car, or of the train, by the servants and employees of the company, were not impeded or interfered with;" and this was the ground of the decision, so far as that point is concerned. Here the facts are different.

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Another point upon the law and testimony in this case might be worthy of consideration. The plaintiff takes the evidence of four witnesses, (excluding his own) as to the value of this horse: one fixes his value, at the time of shipping him, at \$2,000; one at \$1,200 or \$1,500; one at \$3,000, and one at \$2,500; the plaintiff himself fixing it also at \$2,500; but three out of these four witnesses, testify as follows, to-wit: John E. Irwin, "he was of no value except as a race horse, and would be of no value to any one, except for winning money by betting on his speed in racing; he might be a riding horse, I don't know as to that." John Roderick (son of the plaintiff) testifies, "the horse was a fast race horse; would be of



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no value except to win money at racing." James Gibson testifies, "he was a very fast racer; don't think the horse was of much value except that the owner might make money by betting on him." By this testimony, the chief, if not the exclusive, value, of this horse is made to consist, not in his ability to render useful service in the ordinary and lawful employments of men, but in the ability which he furnished to his owner, to make money by betting on his speed in the race.

To run a horse race on the public roads of this State, and betting on the same, are forbidden by its statutes and punished; such practices, on the public roads, at least, are made unlawful, regarded as dangerous to the public safety, and demoralizing. This may also be true of the practice under other circumstances; and its evil is apparent in the fact disclosed in the evidence, that this horse, at the time of the accident, was on his way to Baltimore to run a race, on which his owner had bet \$600; and he was most cruelly compelled, in his crippled, wounded and suffering condition, to attempt to run the race, and fell at the end of a hundred yards. Does the law allow compensation for the loss of any property, which can only be used by its owner, as the testimony indicates, for the purpose of making money by the demoralizing practice of racing and betting? This horse was doubtless of some use for other purposes, but this large verdict was manifestly given in view of his racing qualities, upon the testimony before cited. But waiving any further pursuit of this enquiry, the judgment of the circuit court, for the other reasons stated, granting a new trial, made at the August term, 1868, is affirmed, with costs and damages to the appellee.

Haymond, President, and Hoffman, Judge, concurred in the first three points stated in the syllabus. Hoffman did not concur in the fourth point, nor in all the reasoning in support of the fifth point. Moore, Judge, absent.

JUDGMENT AFFIRMED.

## CHARLESTOWN.

PITZER, ADMR., v. BURNS.

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1. The limitation in equity, as against mortgages and deeds of trust conveying property to a trustee, to secure the payment of debts, when the statute of limitations does not govern, is twenty years; and, under circumstances, a greater period. Such limitation is barred upon presumption of payment, and not upon analogy to the statute of limitations, as applicable to the action of ejectment or any other real action; but by analogy to the limitation from presumption of payment in actions at law, upon a single bill, if it is not a mere rule of equity.
2. In a suit in equity to enforce a deed of trust given upon land to secure the payment of money, the fact that the grantor remained in possession of the land for 17 years, after the right to sell the property to pay the debt accrued, does not operate a bar to the suit.
3. In a suit commenced in 1867, and pending on the 1st day of April, 1869, and at no time barred, in computing the limitation to the action, the time from the seventeenth day of April, 1861 to the 1st day of March, 1869, must be excluded from the computation.
4. B., on the 26th day of September, 1845, executed a deed of trust conveying to C. land in trust, to secure the payment of a debt of \$300 with interest from the date aforesaid, to F., and other debts to other persons. The deed of trust provides that if the debts therein named are not paid within one year, that the trustee shall sell the land at public auction to pay the debt. On the same day the deed of trust was executed, F. executed to B. a writing, in these words: "It is hereby understood and agreed that if I do not succeed in clearing B. of either of the suits now pending in the circuit court of law of Berkeley county by H., assignee of W. G. B., then the note embraced in a trust deed of this date, to be void and of no ac-

|     |     |
|-----|-----|
| 7   | 63  |
| 35  | 165 |
| 35  | 561 |
| 7   | 63  |
| 44  | 448 |
| 7   | 63  |
| 57  | 39  |
| 7   | 63  |
| 662 | 530 |

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count: if I succeed in clearing him of but one of the two cases, it is void as to all but one hundred and fifty dollars, or the one half.

September 26, 1845.

F."

F. was at the time the counsel and attorney of B., to defend said pending suits, in the writing mentioned.—HELD:

That to read said writing with the acknowledgement of debt to F. contained in the deed of trust and give it the most liberal construction, it can only have the effect to make the debt of F. conditional, and a substantial compliance with the condition, by F., is sufficient, in equity, and the debt then became payable and F. entitled to enforce the deed of trust, in equity, for the payment of his debt and interest.

This was an appeal, by John Burns, from a decree of the circuit court of Berkeley county, rendered on the fourth day of November, 1870, in a suit therein pending, between John W. Pitzer, administrator of John H. Likens, deceased, Dennis Murphy and Charles James Faulkner, complainants, and John Burns, John P. Kearfott, administrator of Samuel D. Campbell, deceased, John S. Light, Bartley Pitts and Ruth his wife late Ruth Burns, John W. Pitzer, administrator of Meverell Locke, deceased, Jacob Vandoren, Jr., survivor of the late partnership of Robert C. Briarly & Co, John W. Pitzer, administrator of Robert Campbell, deceased, Joseph Hoffman and John P. Kearfott, executor of Joseph Gorrell, were respondents.

The Hon. Ephraim B. Hall, judge of the said circuit court, as organized under the Constitution of 1863, presided at the decision of the suit below.

The facts sufficiently appear in the opinion of the court.

*C. W. B. Allison*, for the appellant.

*William L. Wilson*, for the appellees.

HAYMOND, PRESIDENT:

The plaintiffs filed their bill in equity in the circuit court of Berkeley county, in a cause commenced on the the seventh day of September, 1867. The bill was filed

at October rules, 1867; and it alleges that on the twenty-sixth day of September, 1845, the defendant, John Burns, Jr., of Berkeley county, executed a deed of trust making Samuel D. Campbell the trustee, and conveying his undivided moiety of a tract of two hundred and seventy-one acres of land to secure debts named in the deed of trust, among others, a debt due to plaintiff Faulkner for \$300, with interest from the date of the deed of trust, and that the debts due to John H. Likens and Dennis Murphy, are not ascertained, in amount, in the trust deed: That by the terms of the deed of trust, the grantor therein, was, allowed until the twenty-sixth day of September, 1846, to pay the debts, before any sale should be made, under the terms of the deed of trust. The bill also alleges that the plaintiff Faulkner has more than once written to defendant Burns, requesting payment of interest upon his debt, but he has paid no attention to the letters: That he felt reluctant to enforce the trust against him, as at the time of its execution the grantor was considerably involved in debt, &c.: That Campbell the trustee, is dead, and that there are several other creditors named in the trust deed who may, or may not, have been satisfied. The bill makes Burns, and the administrator of the trustee, and all the other creditors named in the deed of trust, defendants, and prays that the true amount of the debts of the trust creditors be ascertained by a commissioner; that another trustee be appointed in place of Campbell, deceased; that the interest of Burns in the tract of land be sold, if necessary, for the payment of the trust debts unpaid, &c.

An office copy of the deed of trust is filed with the bill and it purports to be an indenture "between John Burns, Jr., of the county of Berkeley and State of Virginia, of the first part; Samuel D. Campbell, of the county and State aforesaid, of the second part; and Ruth Burns, of Platte county, and State of Missouri, Charles James Faulkner, of Berkeley, Virginia," &c.: and it recites among other

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things, that "the said John Burns, Jr., is further indebted to the said Charles James Faulkner, in the sum of \$300, with interest from the twenty-sixth day of September, 1845," and conveys to Samuel D. Campbell one undivided moiety of a tract of land in the county of Berkeley, on the waters of Opequon creek, containing about two hundred and seventy-one acres, devised to John Burns, Jr., by the last will of his father, George Burns, deceased, of record in the county court of Berkeley, together with a moiety of all the improvements on the same, *in trust*, nevertheless, that is to say, if the said John Burns, Jr., shall not pay to the creditors named in the deed of trust, on, or before the twenty-sixth day of September, 1846, the several sums of money specified as due to them, with interest on the same as before stated, &c., then the trustee shall proceed to sell the land at public auction, &c. and out of the proceeds of sale shall pay the several debts with their accruing interest, &c. There is this clause in the deed of trust, viz: "It is understood and agreed between the parties to this deed that the property hereinbefore conveyed shall remain in the possession and custody of the said Burns until the sale may become necessary, under the provisions of this deed; and further, that the trustee shall not be responsible for the same, except for loss and injury, after the same may come into his possession as trustee as aforesaid."

The defendant Burns filed his answer, to which a general replication was filed by plaintiff Faulkner. In his answer Burns says that "the debts due by him to the plaintiffs and to the other parties named in the trust deed filed with the plaintiff's bill, have all been fully paid and discharged long since, except the claim stated to be due to Charles James Faulkner;" as to which, the answer states in substance that on the day of the execution of the deed of trust, Faulkner executed a paper to him (Burns) setting forth that if he (Faulkner) should not succeed in clearing him (Burns) from certain suits brought against him by Minor Hurst, assignee of G. W.

Burns, then the claim, to-wit: \$300, and the same stated <sup>1873.</sup> August Term.   
 in the trust deed should be void, or if he should succeed <sup>Pitner, Admr.,</sup>   
 in clearing him of, or defeating, only one of said suits the <sup>V.</sup>   
 claim should be reduced to \$150, and that he (Burns) <sup>Burns.</sup>   
 will exhibit evidence of the payment, and of the paper or   
 agreement executed by Faulkner; and he (Burns) says that   
 Faulkner did not succeed in clearing him of, or defeat-   
 ing, either of the claims, and he pleads that he did not   
 assume to pay any of said claims within, five, ten, fifteen,   
 or twenty years prior to the institution of this suit; and   
 therefore he claims the benefit of the plea of the statute   
 of limitations in bar of each of said claims. The paper   
 alluded to in the answer of Burns, as being executed by   
 Faulkner, is filed and proven, and is in these words, viz:   
 "It is hereby understood and agreed, that if I do not   
 succeed, in clearing John Burns of either of the suits now   
 pending in the circuit court of law of Berkeley county, by   
 Minor Hurst, assignee of W. G. Burns, then the note   
 embraced in a trust deed of this date to be void, and of   
 no account; if I succeed in clearing him of but one of   
 the two cases, it is void as to all but one hundred and   
 fifty dollars, or the one-half. September 26, 1845.

CHAS. JAS. FAULKNER."

Plaintiff Faulkner was at, before and after, these trans-   
 actions a practicing attorney in the circuit court of   
 Berkeley county, and was also the attorney of Burns in   
 said causes. The cause was in September, 1868, referred   
 by the circuit court to a commissioner with instructions   
 to ascertain and report the debts embraced in the deed   
 of trust which remain due and unpaid, &c. The commis-   
 sioner, in his report, made in pursuance of the order of   
 reference, reports that all the debts mentioned in the   
 deed of trust have been paid, except the debt of   
 Faulkner, the only evidence of which is the face of the   
 deed of trust, and was at the time of the execution there-   
 of, September 26, 1845, \$300; and that the interest on   
 the same to the 26th of April, 1869 is \$424.50, making

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in the aggregate \$724.50. The commissioner states in his report that "This debt is claimed by the defendant Burns for reasons shown in his answer to the bill in this cause, not to be due to Mr. Faulkner. This, however, is not a matter to be determined by your commissioner, so far as the statute of limitations is concerned." The report was filed by the commissioner, in the clerk's office on the 22d of March, 1869, and no exceptions were ever filed thereto. The depositions of defendant Burns, and plaintiff Faulkner were taken, and they, with the exhibits accompanying the same, therein referred to and mentioned, are also filed, and appear in the cause. The cause was heard by the circuit court, on the 4th day of November, 1870, on the papers theretofore read and upon the report of the commissioner, and the depositions and exhibits therewith filed. On the consideration whereof, the court being of opinion that the statute of limitations, pleaded in the answer of defendant Burns, is no bar to the right of complainant, Charles J. Faulkner, to enforce his debt by a sale of the property conveyed in trust for its security, the said deed of trust being an instrument under seal; and the court being further of the opinion, upon the evidence in this cause, that the debt claimed by the complainant Faulkner, is justly due him; the court decreed that if the defendant John Burns, fails to pay to the plaintiff, Faulkner, on or before the 1st day of January, 1871, the sum of \$752, his debt and interest up to the date of the decree, with interest from the date of the decree, together with costs, &c., then in case of such default, John Blair Hoge was appointed a special commissioner to sell a sufficient amount of the land to pay the debt, interest and costs. It appears in the case that the tract of 271 acres of land, in the deed of trust mentioned, was, before the rendition of the decree of sale, partitioned, in someway, by metes and bounds, and that John Burns' part contained 135 acres. These facts are stated in the decree, and commissioner Hoge is directed to sell so much of the 135 acres, belonging to

Burns, as will be sufficient for the purpose aforesaid.

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From this decree of sale, Burns appealed, and he now claims in this court, by his counsel, that the decree of sale is erroneous and should be reversed for the following reasons: viz:

1. That, from the papers and evidence in the cause the debt claimed by Faulkner, and decreed to him, was, never, at any time, due and owing from him (Burns) to Faulkner.

2. The statute of limitations applies to actions at law, and not in terms to a suit in equity, upon a mortgage, or deed of trust, but courts of equity enforce the statute of limitations by way of analogy—and as against a mortgage, or provisions to secure these debts, a deed of trust is executed, and that the period that will bar an action of ejectment should bar a suit in equity, to foreclose a mortgage upon land or to sell land conveyed in trust, to secure a debt. And that the statute of limitations as to the action of ejectment, was, in the county of Berkeley, at, and before the commencement of this suit, fifteen years—that counting out the time from the 17th day of April, 1861, to the 1st day of March, 1865, as required by law, at the commencement of this suit, seventeen years after the cause of action accrued, if any ever did accrue, this suit was commenced, and the court should have dismissed the bill. The second objection will be considered first.

The principles which apply to mortgages in equity so far as limitations are concerned, in case of the mortgagee foreclosing his mortgage, and the beneficiary party in a deed of trust asking to have the deed of trust executed, by a sale of the trust property, are similar, if not identical. There has been great variety, and confusion in the decisions of the various courts of the Union upon the subject of mortgages, and especially, touching the limitation which should be allowed to operate a bar to the mortgagee to foreclose his mortgage, and the mortgagor to redeem, after the mortgagee has entered upon for condition broken. "In equity, the



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interest of a mortgagee is essentially different from that at common law. It has two aspects, one before, and the other after the condition of the mortgage has been broken, and sometimes a third, where this breach has been followed by actual possession taken of the premises, by the mortgagee. Besides, recourse is often necessary to be had to the forms of law in order to enforce a mortgagee's rights. Here a different set of terms is made use of, in relation to his interest from those used in considering it in equity. In one connection, it may be spoken of as a personal interest, in the other as a legal estate. As a general proposition, equity regards a mortgage, especially before the condition is broken, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself. It treats the debt as the principal thing, and the land as a mere incident to it. Whatever it does with the land is auxiliary to enforcing payment of the debt. Hence arises two sets of rules in respect to the rights and interest of every mortgagee in England, and in this country, except in those States, where the one, or the other, is superseded or modified, by legislation or local law. And the confusion, if confusion it is, that may have arisen in administering these two systems, may be ascribed in some cases, at least, to the same court, exercising both law and equity jurisdiction, as is the case in several of the states. In some of the states the form of enforcing a mortgage is by process at common law, the statute working out a foreclosure by lapse of time. In others, the form is by process in equity, by a decree of foreclosure, such as, ordinarily, is adopted in England. In others still, the form is by a sale of the premises, effected through a decree in chancery. Besides this, in several of the States, as in England, a mortgagee may obtain possession of the premises by a writ of entry or process of ejectment, in which his legal rights are chiefly or alone regarded." Wash. on Real Prop., vol. 1, 2nd ed., 544, 545, and the many authorities there cited in

notes. The same author, in same volume, at page 601, section 25, says: "A mortgagor may be barred of his right of redemption by limitation, where the possession of the premises has been adverse for twenty years or a shorter period, conforming to the statute of limitations of the State where the land lies, as where the mortgagee has been in possession, during that time, without recognizing that he held under his mortgage. In such a case, the law presumes the equity extinguished. But no length of time of holding possession by a mortgagee will bar the right of redemption, if the mortgage is treated during that time, as a subsisting security for the debt."

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The same author, in the same volume, on page 603, section 27, says: "On the other hand, there are presumptions in favor of the mortgagor, arising from long continued possession by him of the mortgaged premises, without paying rent, or interest, or admitting the existence of an outstanding mortgage debt. If this is continued for twenty years after condition broken, it raises the presumption that the debt has been paid, and the mortgage redeemed. And a bill for foreclosure on the part of the mortgagee would thereby, ordinarily, be barred. But it would seem that there must be something on the part of the mortgagor showing, affirmatively, that he does not hold in subordination to the mortgagee's title, in order to have the time of limitation begin to run. But the mortgagor may give to his possession an adverse character by some unequivocal act, hostile to the title of the mortgagee, and brought distinctly home to his knowledge. Such act, however, must be a clear, open, explicit denial of the mortgagee's title, and a refusal to hold under it, brought home to the knowledge of the mortgagee. And until then the statute of limitations does not begin to run, and in this the English and American law coincides." In *Harrison v. Harrison*, 1 Call., 419, it was held by the court that "There is no positive direction in the statute that the court of chancery shall be bound by the periods prescribed in the

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law; but that court adopts them by analogy to the rules of law." In the case of *Ross v. Norvell*, 1 Wash., 14, it was decided by the court that "The reason why twenty years is generally fixed upon as the time within which an application to redeem must be made, is 'not because the right of redemption, after such a lapse of time, is presumed to have been abandoned. Slaves may be redeemed after 5 and within 20 years.'" In that case, on page 24, the court says, in its opinion, "A more correct principle would seem to be that after twenty years, a dereliction of the right of redeeming, ought to be presumed, as a debt due by bond, or even a judgment, is presumed paid if that length of time has elapsed without payment of interest, or some acknowledgement which may repel the presumption." See also case of *Robertson v. Campbell and Wheeler*, 2 Call., 421.

Story, in his 2d vol. of Eq. Juris, page 296, section 1028 b., says: "Similar considerations, will, in many respects, apply to the right of foreclosure of a mortgage. If he has suffered the mortgagor to remain in possession for twenty years after the breach of the condition, without any payment of interest or admission of the debt, or other duty, the right to file a bill for a foreclosure will generally be deemed to be barred and extinguished. However, in cases of this sort, as the bar is not positive, but is founded on presumption of payment, it is open to be rebutted by circumstances." 20 Missouri, 488. In *Giles v. Baremore*, 5 John, Ch. 550, it was held, as to a mortgage, that "Presumptions of the payment founded on lapse of time are matter of evidence, and not in most cases, *proprio jure*, matter of plea in bar." In *Bradford Hilland v. Alban Shurtleff*, 2 Met., (Mass.) 26, it was held that "Continued possession of mortgaged premises, by the mortgagor and his heirs, for twenty years after the mortgage debt was payable, without any entry or claim by the mortgagee, constitutes a presumption in fact that such debt has been paid." This is the syllabus, but it will be seen by reading the opinion of the court, on page 28,

that some importance is attached to adverse possession, and also to presumption of payment, as in the case of a bond.—*See page 27.* In the case of *Hammonds v. Hopkins*, 3 Yerg. (Tenn.) 528, it is held “that time in the court of equity has been taken in analogy to the statute of limitations is admitted. But what is meant by this expression, in analogy to the statute? We do not understand by the terms used that we are to take the same period which the statute has fixed for the courts of law. All that is intended to be expressed is, that equity will interpose her rules as to periods within which she will act upon rights purely equitable. She will not enforce stale equities, but will rather, when great length of time has intervened, decline her interference upon a presumption, that if the claim had been well founded, and had not been satisfied, it would have been presented earlier.” See Hilliard on Mortgages, section 34, pages 18 and 19. In Hilliard on Mortgages, page 8, section 12, it is said: “So Prof. Greenleaf remarks, that the supposed relation of the mortgagor to the mortgagee, as his tenant, is not allowed to operate against the presumption of payment arising from the mortgagor’s continued possession. After twenty years, this presumption may be made, even in chancery.” The same author, on page 24, section 52, a., says: “The lapse of twenty years, without payment of interest, or demand made, the mortgagor being in possession, will raise the presumption that the debt has been paid; yet that presumption may be repelled by evidence that the mortgagor was a near relative of the mortgagee, or in embarrassed circumstances.”

~ In Angel on Limitations, fifth edition, page 451, section 450, it is said that, “It was held by Ch. J. Marshall, that the estate of the mortgagor only was confiscated, not of that of the mortgagee. And that the possession of the mortgagor was not adverse.” See this doctrine discussed, generally, by the same author in pages 449 to 456 inclusive. Authorities vary as to whether

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there is no bar, or that a mortgagee must, as to limitation, be put, in equity, upon the footing of a bond or other specialty as to presumption of payment. See same author page 453, sections 453, 454 and 455. In the case of *Clark v. McLure*, 10 Gratt. 309, Judge Allen in delivering the opinion of a majority of the court, says: "As a general rule, possession to give title, must be adversary. And where the defendant has entered under the plaintiff and acknowledged his title as that under which he holds, he cannot controvert it." And further on in the same opinion on page 314, he says: "In all these cases of vendee who has no deed, of lessee, mortgagor *cestui que trust*, &c., where one is in under the owner of the legal title, a privity exists, which precludes the idea of a hostile, tortious, wrongful possession, which could silently ripen into a title by adverse possession under the statute of limitations." In *Kirk v. Smith*, 9 Wheat. (Sup. Ct. U. S.) 241, Judge Marshall says: "It would shock the sense of right which must be felt equally by legislators, and by judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title."

In Virginia and West Virginia a deed of trust such as that in this case, has to a great extent been substituted for the mortgage, and it is regarded as a security for the debt. In the case of *Oreigh's Heirs v. Henson*, 10 Gratt. 231, Judge Moncure says: "The possession of the grantor in a deed of trust after the execution of the deed, is not adverse to the title of the trustee, but only as his tenant at will or sufferance. The trustee may eject him without notice; or without ejecting him may convey the trust subject to a purchaser, whose tenant at will or sufferance, the grantor will then become, and by whom he may in like manner, be ejected without notice." This was held by the entire court as may be seen by the syllabus of the case. See *Newman v. Chapman*, 2 Rand. 93. In the case of *Jones' adm'r v. Conner's exor*, 5 Leigh 353, which was a bill filed to fore-

close a mortgage upon slaves alone, Judge Brockenbrough in his opinion, from which none of the Judges dissented, says: "Admitting that the mortgage was executed to secure a *bona fide* debt, the next question is, whether according to the proofs in the cause, we ought not to refuse any relief to the plaintiff, on the ground, that from great lapse of time, the debt should be presumed to be paid or released. The mortgage was executed in August, 1786, the debt was made payable on the 1st of January, 1788, and the bill was not filed till August, 1812—a period of twenty-six years from its execution, and of even more than twenty-four years after the debt became due. Twenty years is a sufficient period to authorize the presumption of payment in debt on bonds; and when it appears that the debt had not been satisfied, the jury under particular circumstances, and on account of the great lapse of time, may presume it was released." *Blanchard on Lim.* 93; *Washington v. Brymer*, Peake's Evidence Appendix No. 4. So too, in mortgages, even on land, the right of redeeming after twenty years is presumed to have been abandoned, and *a fortiori* it applies to mortgages of slaves; and if the creditor does not seek to foreclose the equity of redemption within that time a strong presumption arises, that the debt has been paid, or the deed released. *Ross v. Norvel*. 1 Wash. 14."

A deed of trust is a sealed instrument and in this case it acknowledges a debt of \$300 to be due Faulkner with interest from the twenty-sixth of September, 1845, payable the twenty-sixth of September, 1846.

From what has preceded it is clear that in Virginia the limitation in equity as against mortgages and trust deeds when the statute of limitations does not govern is twenty years, and that such limitation is based upon presumption of payment and even when more than twenty years has elapsed from the time the right to sue accrued, in some cases, under circumstances, payment will not be presumed. This limitation, acted on by courts of equity in Virginia, is not by analogy to the statute of limitations as applicable to

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the action of ejectment, or any other real action, but by analogy to the limitation from presumption of payment, in actions at law upon a single bill, if it is not merely a rule of courts of equity. This it seems is but reasonable, for if it were not so, if a single bill were given for a debt secured by a deed of trust, and twenty years were the limitation to an action on the single bill, and fifteen years the limitation to an action of ejectment, the security for the debt would be barred by limitation, before the debt. This suit was commenced prior to the time the Code of this State of 1868 took effect, and was pending at that time, and according to its provisions no part of it, so far as limitations are concerned can effect it, or apply to it.

If the statute of limitation in the Code of 1849 and 50 and 1860 is applied to this case the limitation would be twenty years from the first day of July, 1850. It is true that the limitation to the action of ejectment at the commencement of this suit, in the county of Berkeley, was fifteen years. But the possession that will constitute a bar to an action of ejectment must be an adversary possession. Fourteen years after the date of the deed of trust Faulkner demanded the interest then due upon his debt by letter, as Burns admits, and eight years after that he demanded it again, and the debt not being paid this suit was brought. Counting out the period between the 17th day of April 1861, and the 1st day of March, 1865, as is proper in this case, only about seventeen years elapsed from the maturity of the deed of trust till suit was brought, which is not sufficient to authorize a presumption that Faulkner's debt was paid or to bar the suit under the provisions of the Code of 1849 and 1850. Applying the statute of limitations of 1849 and 50 to this suit as commencing to run on the first day of July, 1850, and counting out the period aforesaid, the time in which the suit might be brought has not yet expired. Leaving out the fact that a demand was made as above stated, seventeen years is the extent of

the lapse of time that Burns claims, and from his own statement giving it the most liberal construction, he never claimed to Faulkner, or the trustee, that he did not owe the debt until more than fourteen years after the execution of the deed of trust. It has been held that an action of debt may be maintained upon a mortgage or any sealed instrument, acknowledging a debt. See the case of *Elder v. Rouse*, 15 Wend. (N. Y.) 218. The opinion in that case was delivered by Judge Nelson, and in his opinion many authorities are cited. *Demerritt v. Batchelder*, 8 Foster, (N. H.) 533. But whether an action of debt could be maintained on the deed of trust in this case or not, is immaterial now to determine, as it was not necessary to give validity to the deed, as constituting a lien for the payment of the debt, which equity will enforce, that there should have been a single bill or note given for the debt, or even an express promise of payment contained in the deed of trust. It is sufficient that the deed acknowledges the debt and conveys the property to secure its payment. It has been held that "although the plaintiff's remedy upon the note is gone, it does not necessarily follow that his right to resort to the pledge is lost. And it has accordingly been holden that, notwithstanding an action for the recovery of the debt is barred, the mortgagee may afterwards sustain a bill to foreclose the equity of redemption." *Belknap v. Gleason*, 11 Conn., 160; *Haskell v. Bailey*, 22 *Ibid*, 569—573; *The Michigan Insurance Company v. Brown*, 11 Mich., 265; *Guy Hough v. Mary Bailey*, 32 Conn., 288.

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If we read the memorandum given by Faulkner to Burns, of the date of the deed of trust, with the acknowledgement of the debt contained in the deed, and give it the most liberal construction, the effect can only be to make the debt of Faulkner conditional, and on the performance of the condition, it became payable. A substantial compliance with the condition in such case



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is all that a court of equity will require. It is unnecessary to recite the evidence here, but the evidence in the record clearly shows a substantial compliance with the condition, and that Faulkner's debt is just. It was contended by the counsel for Burns that a different state of facts could have been shown if Burns had had more time to take and file testimony. If the case was not ready for trial when it was heard, and the decree appealed from was rendered, Burns should then, before the cause was heard, have applied to the circuit court for a continuance. This he did not do. This Court can determine the cause only from the evidence appearing in the record; and it acts on the principle, as a general rule, that that which does not appear does not exist, so far at least as relates to facts material in a cause, which are not proven, but might have been proven, if they existed.

For these reasons the decree of the circuit court of the county of Berkeley appealed from, must be affirmed with costs and damages according to law, and the cause be remanded to the circuit court of Berkeley county for further proceedings therein to be had, according to the rules governing courts of equity.

The other Judges concurred.

DECREE AFFIRMED AND SUIT REMANDED.

## CHARLESTOWN.

## BIBLE SOCIETY v. PENDLETON, TRUSTEE.

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The will of M. C., who lived and died in Berkeley county, Virginia, in 1854, and which will was admitted to probate in said county, in 1855, contained this clause, viz:

*First*, I have subscribed two thousand dollars towards the founding of an academy in or near, the town of Martinsburg, to be under the control and direction of the Presbytery of Winchester, (Old School), which, if not sooner paid by me, I hereby direct my executor, first of all, to pay out of the proceeds of the aforesaid land (referring to land in Pennsylvania), as soon as the same may come into his hands, to such person or persons, as the said Presbytery may authorize to receive the same, the sum of \$2,000.

*Second*, I give to the trustees of the Presbyterian Congregation at Martinsburg, (Old School), the sum of \$3,000 to be applied by them towards the purchase of a lot, and the erection thereon, of a house, or the purchase of a house and lot and fitting the same for the residence of the pastor of the said Congregation.

*Third*, To the trustees of the Board of Foreign Missions of the Presbyterian Church in the United States of America, the sum of \$500, to be applied to the uses and purposes of said Board and under its direction.

*Fourth*, To the trustees of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America, towards the fund for super-annuated ministers and their families, the sum of \$500.

*Fifth*, To the trustees of the Board of Missions of the General Assembly of the Presbyterian Church in the United States, the sum of \$500.

*Sixth*, To the American Bible Society, formed in New York in the year 1816, I give the sum of \$500, to be applied to the charitable uses and purposes of said society.—HELD:

That the foregoing bequests are void, under the statutes of Virginia, and the decisions of her Courts.

M. C., living in Virginia, makes a deed conveying land in Pennsylvania to P., to be sold, and directing that the proceeds of said sale

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be held by the grantee, subject (in substance) to the written order of said grantor; M. C. subsequently makes a will, disposing of the proceeds of said land, which will is admitted to probate in Virginia, in 1855.—**Held:**

That the validity of any bequest of said proceeds must be determined by the laws of Virginia in force when the will took effect.

An appeal by James S. Brown and Ann R. Morgan from a decree of the circuit court of Berkeley county, rendered on the 4th day of September, 1871, in a suit pending in said court, wherein the American Bible Society and the Board of Domestic Missions of the General Assembly of the Presbyterian Church of the United States of America were complainants, and Robert Berry, James S. Brown, William A. Morgan and Ann R. Morgan, his wife, the Board of Foreign Missions of the Presbyterian Church of the United States, James A. Graham, Stated Clerk of the Winchester Presbytery, Edmund Pendleton, John M. Harmon, Seaman Gerard, William N. Riddle and E. Boyd Pendleton, trustees of the Presbyterian Church of Martinsburg, and the Trustees of the General Assembly of the Presbyterian Church of the United States, were respondents.

It is believed that the opinion of the Court contains a sufficient statement of the facts and statutes therein referred to, and of the provisions of the will, the validity of which was in issue in this suit.

The Hon. Ephraim B. Hall, judge of said circuit court, as organized under the Constitution of 1863, presided at the trial below.

*C. W. B. Allison* and *Andrew Hunter* for appellants,  
*Charles J. Faulkner* for appellees.

PAULL, Judge :

Maria Cooper, residing in the town of Martinsburg, in Berkeley county, State of Virginia, made and executed her last will and testament, bearing date on the 30th day of June, 1854, and executed a codicil thereto, bearing date on the 20th day of October, 1854. This

will and codicil were duly admitted to probate in the circuit court of said county, on the 11th day of January, 1855.

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The 11th clause in said will is as follows, to-wit:  
*"Eleventh.* I have conveyed my land in Pennsylvania to Edmund Pendleton, in trust, for the purposes set forth in the deed of conveyance thereof, to be held subject to such disposition as I may make of the same, or the balance of the proceeds thereof, as set forth therein. Now I hereby will and direct that the said trustee, Edmund Pendleton, shall pay over the balance of said proceeds, when received by him, to my executor, to be disposed of by him as follows, viz:

*First.* I have subscribed two thousand dollars towards the founding of an academy in or near the town of Martinsburg, to be under the control and direction of the Presbytery of Winchester, (Old School), which, if not sooner paid by me, I hereby direct my executor, first of all, to pay out of the proceeds of the aforesaid land as soon as the same may come into his hands, to such person or persons as the said Presbytery may authorize to receive the same, the sum of \$2,000.

*Second.* I give the Trustees of the Presbyterian Congregation of Martinsburg (Old School) the sum of \$3,000, to be applied by them towards the purchase of a lot and the erection thereon of a house, or the purchase of a house and lot and fitting the same for the residence of the pastor of the said Congregation.

*Third.* To the Trustees of the Board of Foreign Missions of the Presbyterian Church in the United States of America, the sum of \$500, to be applied to the uses and purposes of said Board, and under its direction.

*Fourth.* To the trustees of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America, towards the fund for superannuated ministers and their families, the sum of \$500.

*Fifth.* To the Trustees of the Board of Missions of the

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General Assembly of the Presbyterian Church in the United States, the sum of \$500.

*Sixth.* To the American Bible Society, formed in New York in the year 1816, I give the sum of \$500, to be applied to the charitable uses and purposes of said society:

*Provided,* That in the event the proceeds of said lands shall prove insufficient to pay the whole amount of the several legacies herein devised, then I direct my executor to appropriate the said proceeds of the said lands, *first*, to the payment of the whole amount of the \$2,000 heretofore devised in the first item of legacies out of the proceeds of said land; *second*, the sum of \$3,000, devised for parsonage; and the remainder to be divided *pro-rata* between the other legacies provided for out of this fund.

I further will and order, in the contingency of any failure or defeat of the bequests herein made, or any part thereof, the amount or amounts directed to be paid by said executor, and all the rest and residue of my estate not heretofore devised, shall be divided equally between James S. Brown and Mrs. Ann R. Morgan.

By the codicil to the will, it is directed that \$500, of the \$3,000 before appropriated to the purchase of a parsonage, be paid to the Rev. Robert Berry, pastor of that church; and the balance of \$2,500, be applied to the purchase of the house, in which the testatrix then lived, for a parsonage.

On the 17th day of December, 1852, the said Maria Cooper executed and acknowledged for record, a deed bearing date on the day and year aforesaid, by which she conveyed to Edmund Pendleton, as trustee, a certain tract or parcel of land, containing about four hundred and twenty-five acres, situated in Venango county in the State of Pennsylvania, to be sold by said trustee; and the proceeds of such sale, after deducting all the expenses of executing the trust, to be held by him, "sub-

ject to such disposition as the said Maria Cooper, by deed or other instrument of writing, may hereafter direct.

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In the year 1868, the complainants in this cause filed a bill in chancery, in the circuit court of Berkeley county, making all the parties interested under the 11th clause in said will, parties thereto, setting forth the execution and probate of said will, and claiming that if the devises or bequests therein made, under said 11th clause, for charitable and religious uses, should be held, under the statutes of this State, or by the laws of Virginia, where the testatrix lived and died, invalid, that still their validity would be determined by the laws of Pennsylvania, where the land was situated, from the proceeds of the sale of which these bequests have to be paid. The bill then prays for an account of the proceeds of the sale of this Pennsylvania land, in the hands of Edmund Pendleton, and that the several legacies, above set forth, may be decreed to the parties to whom they have been bequeathed.

James S. Brown and Ann R. Morgan, the residuary legatees under the will, file their answers denying the validity of said bequests, and asking that the proceeds of said land be paid to themselves.

An answer being also filed by Edmund Pendleton, the trustee, the cause was committed in February, 1869, to a master commissioner to take, state and report an account of the moneys in the hands of said trustee : a report having been made, and exceptions filed thereto, the cause was recommitted, in November, 1869, with instructions as to certain matters in the decree specified. In May, 1870, the cause was again heard upon the report of commissioner, and the exceptions thereto, and the court deciding that all of the foregoing bequests were invalid except the one to the trustees of the Congregation of Martinsburg, for a parsonage, again recommitted the report. with instructions touching certain matters of interest.

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On the 4th day of September, 1871, a final decree was entered in this cause, reciting that the same was made upon the papers formerly read and the report of the commissioner, ascertaining the balance in the hands of Edmund Pendleton, the trustee ; that said balance was \$2,672.12, with interest from the 14th of August, 1870 ; and there being no exceptions to said report, the same was confirmed. The decree then directed said trustee, after paying the costs and expenses of this suit, and \$4.37½ on account of other matters, to pay over the residue as follows, to wit : five-sixths thereof to the trustees of the Presbyterian Church at Martinsburg (Old School), and one-sixth to the Rev. Robert Berry.

From this decree, thus rendered on the 4th of September, 1871, the residuary legatees, James S. Brown and Ann R. Morgan have taken an appeal to this court.

Before examining the principles involved in this decree, settling the rights and interests of the parties, we are met by a question raised by the plaintiffs, of a preliminary character. From a supplemental record brought before the Court at its present term, on a *certiorari* issued at their instance, it is insisted by their counsel, that certain exceptions filed to the commissioner's report of May, 1870, have not been disposed of, and claiming that they shew error in the trustee's accounts, it is asked that the final decree be reversed and the cause recommitted. This objection, we think, cannot be maintained. The report was recommitted in May, 1870, and fifteen months after that time, the final decree is made, reciting that the cause was heard on the commissioner's report, to which there were no exceptions and the same was confirmed. In making up the record with a view to an appeal, it is not necessary to copy the report of a commissioner to which there is no exception. Ch. 135, sec. 6, Code W. Va.

With this recital and evidence found in the final decree, this Court must regard all former exceptions as

withdrawn or abandoned, and will not make them the subject of examination.

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Proceeding now to notice the questions touching the validity of the bequests made by the 11th clause in the will of Maria Cooper, the first inquiry is, by what laws shall their validity be determined?—by the laws of Pennsylvania, where the land was situated, from the proceeds of which these legacies are to be paid, or by the laws of Virginia, where the testatrix lived and died, and where her will was made and admitted to probate.

This question was elaborately discussed by the counsel on either side. We think the question can be readily and conclusively settled by referring to the nature of the deed from the grantor to Edmund Pendleton, dated December 17, 1852. It will be there seen that this land in Pennsylvania was conveyed to the grantee with instructions to sue for and recover the same; to adjust any claim of the grantor thereto, and then to sell said land at public or private sale, and after paying all expenses arising under said deed, to hold the balance, "subject to such disposition as the said Maria Cooper, by deed or other instrument of writing, may hereafter direct." It is with this balance of the proceeds of said land that this case has anything to do: and as to this balance, the deed creates no trusts whatever, but simply directs the grantee to hold the same, subject to the written order of the grantor, as its language may be well construed or read. The grantor might have made this order in her lifetime to pay over these proceeds either to herself or to any other person or party, or she might dispose of the same by her last will and testament. She had complete control and dominion over the proceeds of this land, and when the same were realized, or came into the possession of the grantee, they were a part and parcel of her personal estate just as fully, and were impressed with no other quality or property, than if



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they had been received from the sale of lands in Virginia. The will directs the payment of certain legacies, and simply designates the proceeds of this land as the fund or portion of the personal estate out of which they should be paid. Most manifestly therefore, the laws of Pennsylvania can have no operation and can have no influence in construing the language of this will, or determining the validity of any of its dispositions touching this fund. They can no more control or determine the direction of this fund than they can control or direct the movements of a stream, whose source indeed may be within the limits of that State, when it comes to flow exclusively within the limits of Virginia. Turning then to the laws of Virginia, where this will was made, and where the testatrix resided: Are these bequests valid?

We are not informed by any thing in this record, by the bill or answers, or any other pleading, or by any evidence whatever found therein, who or what the parties are, whether natural persons or corporations, to whom bequests have been made under the 11th clause of the will. It is claimed indeed in the bill that the plaintiffs have been incorporated by the Legislature of Pennsylvania; but no evidence of the fact appears in the record. We have as little information, moreover, as to who are to be the beneficiaries of these respective bequests; who shall find, or who shall determine them; they are not named in a form or manner by which they can be ascertained with any certainty, and thereby be made the recipients of the bounty of the will. These indefinite charities, however it may be in other states, have in Virginia been held invalid at common law, by her highest court, and since the repeal of the Statute of 43, Elizabeth, by her Legislature, been held incapable of execution. The want of clearly recognized grantees, or clearly recognized beneficiaries, constitute the indefinite character of these charities, and render them void at common law. This doctrine is clearly set forth and in-

dictated in the able opinion of Judge Tucker, in the case of *Gallego's Ex'ors. v. Attorney General*, 3 Leigh, 450. Here also he reviews and vindicates the past legislation of that State, and the policy on which it was based, to prevent the possible interference of religious establishments in matters of government, if they were permitted to accumulate large possessions: "hence the tenacity with which applications for permission to take property in a corporate capacity, (even the necessary grounds for churches and graveyards) have been refused." His views are illustrated in this regard by a reference to the tremendous evils to be found in the history of France and of England from the vast accumulations of property in the hands of church establishments, and these views have ever since left their impress on the jurisprudence and history of that State. This may be seen in the fact, that in the amended Constitution of that State of 1851, it is provided for the first time, that the General Assembly shall not grant a charter of incorporation to any church or religious denomination. The authority of that case has been recognized, and has been affirmed, in the case of *Brooke vs. Shacklett*, 13 Gratt. 301 and *Seaburn's Ex'or. vs. Seaburn et als.*, 15 Gratt, 423.

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According to the principles settled in these cases, the bequests contained in the 11th clause of the will of Maria Cooper, for educational and religious charities, are undoubtedly void, by reason of their indefinite character and uncertainty. This seems indeed to be conceded in the bill and was not controverted in the argument.

But it was contended by the counsel for the appellees, that the bequest for the Martinsburg academy was valid by virtue of section two of chapter eighty in the Code of Virginia of 1849, which was in operation when the will under consideration took effect. This section provides that any gift, grant, devise or bequest, which since the second day of April in the year one thousand eight hundred and thirty-nine, has been, or at any time

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hereafter shall be, made for literary purposes, or for the education of white persons within this State, (other than for the use of a theological seminary,) whether made to a body corporate, or unincorporated, or to a natural person, shall be as valid, as if made to, or for the benefit of a certain natural person : And we are referred to the case of *Kelly v. Loves' Admr.* 20 Gratt. 124.

In the will of the testator in this case, a devise was contained for the erection of a school house and the payment of a teacher, and the appointment of a board of commissioners for its management. The court declared that this devise was void at common law, but by virtue of the act of Assembly of 1839, in operation at the death of the testator the devise, was held to be valid. That act made valid devises and bequests for the establishment of unincorporated schools, academies and colleges. But there was this important difference between that act and the second section of chapter eighty of the Code of 1849. The latter section excepted from the operation of the Code a devise, or bequest, for the use of a theological seminary. This exception was not found in the act of 1839.

Let us see whether the bequest for the Martinsburg academy, in the will now under consideration, comes within the exception, supposing it to be otherwise good. The language is, that it is given "towards the founding of an academy in, or near to the town of Martinsburg, to be under the control and direction of the Presbytery of Winchester (Old School), and was directed to be paid, "to such person, or persons, as the said Presbytery may authorize to receive the same." It is suggested that the theological seminary contemplated by the Code, is an institution for the education and preparation of young men for the ministry. Conceding this to be so, such a purpose might be readily accomplished by an institution, whatever its name, "to be under the exclusive control and direction of the Presbytery," which would have the power of prescribing what should

be the subjects of study and what classes, or persons should enjoy the privileges of the institution. We think the language of the will, in this particular, brings the bequest within the exception, and is contrary to the spirit and design of the act, and to the policy of the State of Virginia. If the institution, whatever may be its name, could accomplish what is forbidden by the act, the act itself is rendered nugatory. We may not rest principles of law, or the decision of the case upon what might readily prove a mere evasion of the statute. No such legislation is found in the Code of West Virginia, but this was the law of Virginia, when this will took effect. In the case in 20 Gratt., heretofore cited, the testator seems to have been so impressed with the policy of the State, or the wisdom of the principle, that he directed as follows: "That no one sect or denomination shall have any power or control over said school house," thus making himself a provision, which was not contained in the act of assembly at that time.

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In regard to the bequest to the trustees of the Martinsburg congregation, the circuit court held the same to be valid, as recited in the decree, by reason of the conveyance made prior to the death of the testatrix. This is an effort to uphold the laudable object of the will under the first section of chapter fifty-seven of our Code, or a similar provision in the Code of Virginia. This is the only substitute we have for 43d. Elizabeth; upon examination we find that while it does authorize the conveyance of land for the residence of a minister, it is silent in regard to devises and bequests for this purpose. And it has been expressly held in Virginia, that the word conveyance in this section does not include a *devise* of land, and, *a fortiori*, that it does not authorize a bequest of money for this purpose. *Seaburn's Ex'or v. Seaburn*, 15 Gratt. 423. We presume the deed referred to in the decree, is the deed from the testatrix to Edward Pendleton. What we have heretofore said in regard to

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the character of that deed, as being little else than a mere power of attorney to sell the land, and hold the proceeds subject to the order of the grantor, will suffice to show that that deed is very far from fulfilling the requirements of the Code, and cannot be held a conveyance for such a purpose. In thus defeating the charitable purposes of this will, we may use the language of Judge Tucker: "It is not that charity is banished from Virginia, or from this State. Its benign and salutary influence may warm and animate every heart, and lead to a generous munificence, as the daily habit of our lives, without exposing the State to the evils which have always flowed from what are called conveyances in *mortmain*." We may add, that it is not to dry up the streams of charitable feeling and action, but to control to a limited extent, the manner of their operation, for what has been deemed, in the policy of the law, sufficient reasons

The decree of the circuit court of Berkeley county, made on the fourth day of September, 1871, is reversed, with costs to the appellants; and this court proceeding to render such decree, as the court below ought to have rendered, doth adjudge, order and decree, that Edmund Pendleton, trustee of Maria Cooper, deceased, do pay, out of the balance of two thousand six hundred and seventy-two dollars and twelve cents, with interest thereon from the fourteenth day of August, 1870, now in his hands, (after deducting therefrom the sum of four dollars and thirty-seven cents) unto Rev. Robert Berry, the sum of five hundred dollars, with interest thereon from the first day of November, eighteen hundred and fifty-five; and that he pay over the residue of said money in his hands unto James S. Brown and Mrs. Ann R. Morgan, the residuary legatees named in the will of said Maria Cooper.

The other Judges concurred.

DECREE REVERSED.

## CHARLESTOWN.

## BUSKIRK v. JUDGE OF CIRCUIT COURT.

August 22, 1878.

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| 7  | 91  |
| 34 | 357 |
| 7  | 91  |
| 39 | 406 |

1. The 7th section of chapter 16, of the acts of the Legislature of West Virginia, 1872-3, entitled "An act organizing the Supreme Court of Appeals, defining its jurisdiction and powers, and prescribing its manner of proceeding," does not apply, in whole, or any part thereof, to a case of prohibition, commenced in the Supreme Court of Appeals. **DISENTIENT, HOFFMAN, JUDGE.**

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| 7  | 91  |
| 43 | 619 |
| 7  | 91  |
| 44 | 586 |

2. B. was indicted in the circuit court of the county of Logan for the murder of M. on the 12th day of July, 1870. At the time the indictment was found, B. was in jail in said county upon a charge of murder. On the 20th day of March, 1873, B., who had been bailed, appeared in said court in discharge of his recognizance of bail, and on the 22d day of March, 1873, the court, on the motion of B., changed the venue, and sent the cause for trial to the county of Cabell. At the circuit court of the county of Cabell, held on the 27th day of May, 1873, B. was set to the bar of the court, in custody of the jailor of Cabell county, and not having plead or demurred to the indictment, he objected to being tried by the circuit court of Cabell county, upon the indictment, until he was first examined by the county court in pursuance of the provisions of the act of the Legislature, approved April 3, 1873, entitled "An act providing for the examination of persons charged with felony, before the county court;" but the court overruled B.'s objection, and decided that B. was not entitled to an examination, under the provisions of said act of the Legislature, and that the court had a right to proceed, and would proceed, to trial and final judgment upon the indictment without such examination being had; to which opinion and decision of the court, B. excepted. **HOLD:** That if said act of the Legislature of April the 3d, 1873 be valid, and applies to B.'s case (which is not now decided), and the

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| 47 | 350 |
| 47 | 378 |

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| 7  | 91  |
| 49 | 713 |

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| 7  | 91  |
| 54 | 62  |
| 54 | 76  |
| 54 | 506 |

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| 7  | 91  |
| 61 | 427 |

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court erred in its judgment in denying B. said examination, before the county court, before proceeding to final trial upon the indictment, a writ of prohibition does not lie from the Supreme Court of Appeals to the judge of the circuit court to prohibit him from proceeding further with the trial of the indictment until B. shall be examined by the county court, the circuit court having original and general jurisdiction of all cases of felony, conferred upon it by the Constitution and laws: **AND HELD FURTHER**, that B.'s proper and appropriate remedy for the correction of such error, if error it be, is by writ of error in case he should be convicted in the said circuit court of felony, upon said indictment, and not by prohibition before trial and conviction.

3. Prohibition can only be interposed in a clear case of excess of jurisdiction on the part of some inferior judicial tribunal. Where the matter is clearly within the jurisdiction of the inferior court, a mere error in the proceedings may be ground of appeal or review, but not of prohibition.

This was an application to the Supreme Court of Appeals, by Urias Buskirk, for a writ of prohibition against the Hon. Evermont Ward, Judge of the circuit court of Cabell county, to prohibit and restrain him from further proceeding to try said Buskirk, upon an indictment which had been found against him, for the murder of one Morgan. The indictment was returned by the grand jury of Logan county, and, on motion of the respondent, and with the assent of the attorney prosecuting for the State, removed for trial to the circuit court of Cabell county. The grounds of the application were, that, at the date of such application, there was a statute in force in this State, requiring that in all cases of felony the respondent should receive a preliminary examination before the county court, before he should be put on trial in the circuit court unless the respondent expressly waived such preliminary examination, which he alleges he did not in this case, but, on the contrary, demanded. The other facts and the statutes and provisions of the Constitution alluded to, are sufficiently stated in the opinion of Haymond, President.

*James H. Ferguson*, for the petitioner.

*George H. Lee*, for the State.

HAYMOND, PRESIDENT:

The petitioner Buskirk was indicted by the grand jury of the county of Logan, on the 12th day of July, 1870, for the murder of one Peter D. Morgan, in said county, on the 27th day of May, 1870. It appears from the return of Judge Ward that Buskirk was arrested, upon a warrant issued by a justice, on the 28th day of May, 1870, and committed to jail in said county upon the charge of murder, for which he was so indicted; that Buskirk escaped from jail and remained out of reach of process until a short time prior to the 7th day of October, 1872; that on the 11th day of October, 1872, on his petition, a writ of *habeas corpus* was duly awarded in his behalf, and on the 19th day of October, 1872, he was allowed to give bail for his appearance before the circuit court of said county, to answer said indictment; and at the said court, commencing on the 20th day of March, 1873, he appeared in court, in discharge of his recognizance of bail, and moved the court to continue the trial of the indictment until the next term; and thereupon the court granted leave to Buskirk until the next morning to say whether he was ready for trial—it having been announced to the court, by the prosecuting attorney on behalf of the State, that the State was ready for the trial. Thereupon Buskirk was by the court committed to the custody of the sheriff, to be brought into court the next morning. On the next day, being the 21st day of March, 1873, “came the State by her attorney prosecuting, and thereupon the prisoner was brought into court and led to the bar in custody of the sheriff, and in his proper person moved the court for a continuance of the trial of the indictment, on the ground of the absence of counsel, and material witnesses, and also upon the ground that the court house was not then suitable for holding court for his trial. But the court being of opinion that Buskirk had not used proper diligence to prepare for the trial, overruled his motion to continue for want of his counsel and

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witnesses, and took time, until the next day to consider the motion on account of the condition, of the court house, and the state of the weather; and thereupon Buskirk was again committed to the custody of the sheriff, with instructions to return him into court on the next morning, at half past eight o'clock. And on the next day, that is the 22d day of March, 1873, again came the State by her attorney prosecuting, and the prisoner was again led to the bar of the court, in custody of the sheriff and the court then announced, that the weather still being extremely inclement, it was of opinion that the cause could not then be further proceeded with without great danger to the health, and, perhaps, to the lives of persons attending upon the trial; and for that reason the court ordered that the cause stand continued until the first day of the next term. Immediately, Buskirk, in his proper person, moved the court, to change the venue, and remove the trial of the cause from said county, on account of its great notoriety, and the excited feelings of the citizens thereof, and the attorney for the State not resisting the motion, but concurring therein, and the court being of opinion that the cause ought to be removed from said county for trial, ordered that the same be removed and transferred to the circuit court of Cabell county there to be further proceeded in, and that the sheriff of Logan county after the adjournment of the court convey Buskirk, the prisoner, to the jail of Cabell county and deliver him to the jailor thereof; and the jailor of Cabell county was authorized, and directed, to receive into his jail, and there safely keep, Buskirk. The court, at the same time, made the usual order in such cases as to transcript of the record, &c. The prisoner did not demur, or otherwise plead to the indictment, prior to the removal of the case to Cabell county for trial, so far as the record shows. At a circuit court held for the county of Cabell on the 27th day of May, 1873, Buskirk was set to the bar of the court, in custody of

the jailor of said county of Cabell, and not having plead or demurred to the indictment, he, in his proper person, objected to being tried, by the last named court, upon the indictment *until he should be first examined by the county court in pursuance of the act of the Legislature of the State, approved April 3, 1873, entitled "An act providing for the examination of persons charged with a felony before the county court,"* and asked that all further proceedings on said indictment be postponed until such examination should be had. The court overruled the objection, being of opinion that the cause ought to be proceeded in, in that court, to final trial. Buskirk was then inquired of whether he was guilty of the offence charged in the indictment; and he refused to plead or answer, alleging as the reason for his refusal, that he had not been examined by the county court upon said charge, as provided for by the said act of the Legislature, approved April 3, 1873. And Buskirk not confessing his guilt, the court ordered that the plea of not guilty be entered on the record for him. On the 28th day of May, 1873, Buskirk was again set to the bar of the court in the custody of the jailor of said county of Cabell, and thereupon he gave notice of his intention to apply to this court for a writ of prohibition to prohibit the said circuit court from further proceeding in the case, and, thereupon, the court made an order postponing the trial of the case until the 4th Monday in July, 1873, and Buskirk was remanded to the jail of Cabell county. Buskirk took a bill of exceptions to the opinion and judgment of the court refusing and denying to him an examination before the county court upon the charge contained in the indictment, and for other matters not material to state here. All these matters appear from the return of the judge made to the rule issued in the case, and the official copy of the record filed with the petition.

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The Legislature, at its last session, passed an act entitled "An act organizing the Supreme Court of Appeals, defining its jurisdiction and powers and prescribing its

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manner of proceeding," which was approved January 11, 1873. The 4th section of this act provides, among other things, that "The original jurisdiction of the Court of Appeals, (clearly meaning the Supreme Court of Appeals) shall extend to cases of *habeas corpus*, *mandamus* and *prohibition*." This is the first sentence of the 4th section of the act. The 2d section of the 8th article of the Constitution of this State, among other things, provides that the Supreme Court of Appeals shall consist of four Judges, any three of whom shall be a quorum." The 3rd section of same article provides, among other things, that the Supreme Court of Appeals shall "have original jurisdiction in cases of *habeas corpus*, *mandamus* and *prohibition*." The 9th section of same article provides, that "There shall be at least two terms of the Supreme Court of Appeals held annually, at such times and places as may be prescribed by law." The 7th section of the act approved on the 11th day of January, 1873, is in these words: "The State shall be divided into three judicial grand divisions, as follows: The first grand division shall consist of the counties composing the first, second, fifth and sixth judicial circuits; the second grand division shall consist of the counties composing the third and fourth judicial circuits; the third grand division shall consist of the counties composing the seventh, eighth and ninth judicial circuits. Each case shall be heard and determined in its own grand division, except by consent of parties or their counsel, in writing, or unless the parties desiring the hearing shall have given written notice at least thirty days before the commencement of the term, to the opposite party, or his counsel, of his intention to insist on a hearing, when the same may be heard and determined out of its grand division."

The Legislature passed an act, entitled "An act regulating appeals, writs of error and supersedeas," which was approved on the 21st day of December, 1872. The 1st section of this act, prescribes the cases in which ap-

peals, writs of error and *supersedeas* may be granted, &c. 1873.  
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The Legislature passed an act entitled, "An act to amend and re-enact chapter one hundred and eleven of the Code of West Virginia," which was approved March the 24th, 1873. The 1st section of this act provides, that, "the writ of *habeas corpus ad sub-ficiendum* shall be granted forthwith, by the Supreme Court of Appeals," &c. The 6th section provides that "the court or judge, before whom the petitioner is brought, after hearing the matter, both upon the return, and any other evidence, shall either discharge, or remand him or admit him to bail, as may be proper, &c." Buskirk  
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The Legislature passed an act, entitled "An act providing for the examination of persons charged with a felony before the county court," which was approved April the 3d, 1873. The 1st section of this act provides that "before any person charged with a felony is tried before a circuit court, he shall be examined, as hereinafter provided, unless by his assent, entered of record, in such court, such examination be dispensed with." The second section of the act provides that "every such examination shall be had before the county court of the county having jurisdiction of the offence." The counties of Logan and Cabell are each in the ninth judicial circuit, which is one of the circuits that compose the third grand division formed by the seventh section of the said act of the eleventh of January, 1873.

This court is required by law to hold three terms annually, viz: one at the city of Wheeling, in the first grand division, one at Charlestown, in the second grand division, and one at Charleston, in the third grand division. At the last June term of this court, held at the city of Wheeling, this Court, on the petition of Buskirk, verified by affidavit, and presented to the Court by his counsel, awarded a rule against Evermont Ward, Judge of the 9th judicial circuit, embracing, as part thereof, the counties of Logan and Cabell, to show cause, if any he

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could, before this court, why a writ of prohibition should not be issued prohibiting him from all further proceedings against Buskirk upon the indictment pending in the circuit court of Cabell county against him (Buskirk) for murder, until he (Buskirk) has been first examined for said alleged offense, by the county court, in pursuance of the statute in such case made and provided. The rule was made returnable to the first day of the present term of this Court, now sitting at Charlestown, in the second grand division. Judge Ward made and filed a return to the rule on the first day of the present term of this Court, promptly, and in obedience to the rule. Whereupon Buskirk, by his counsel, alleging that the return to the rule was, and is, insufficient in law, moved the Court to award the prohibition mentioned in the rule, and it was suggested that the Court could not now award the writ, even though it were otherwise proper, because the case belonged under the 7th section of said act of the 11th of January, 1873, to the third grand division, and that the court can only hear and determine the matter and award the writ, at a term thereof at Charleston, in the third grand division. This suggestion presents a grave question for consideration and determination. The writs of *habeas corpus*, *mandamus* and prohibition are highly esteemed and appreciated by the intelligent and patriotic of all free, well regulated governments, and the absence and denial of them, as remedies to the citizen has ever been a source of well founded grief and lamentation by the same class in governments of oppression and despotism. So strong has been the regard and appreciation of the people of this State for these writs they have not been content to leave them continual existing remedies, dependant upon mere act of the Legislature, but they have, for wise purposes, made them constitutional writs, and have conferred upon this Court, by the Constitution, as we have seen, original jurisdiction in such cases. The original jurisdiction conferred upon this Court in such cases is but a simple grant of

power and authority to the Court to award such writs in all proper cases wherever prayed for. It is not to be presumed that the Legislature would purposely attempt to deprive this Court of original jurisdiction, or authority expressly conferred upon it by the Constitution, or purposely attempt, indirectly, to destroy, or render useless, such jurisdiction, or authority, as a remedy for the citizen, by unreasonably obstructing and delaying the court in the exercise thereof, by legislative enactment. Upon a close inspection of said 7th section and all its parts, I am clearly of opinion that it was not the purpose or intention of the Legislature in enacting that section to prohibit this court from hearing application for, and awarding writs of prohibition, *mandamus* and *habeas corpus*, or either, or in any wise to restrict the court therein at any of its terms. That the section in fact only applies to cases that are brought into the court by appeal, *supersedeas*, or writ of error. The language is "Each case shall be heard and determined in its own grand division, except," &c. The Legislature has not said what will make any case, or class of cases, belong to any particular grand division, or what will locate or confine a case, or class of cases, in or to any grand division. How are we to ascertain to which grand division any case properly belongs, or in which it should be heard and determined? In cases brought to this Court by appeal, writ of error or *supersedeas*, we cannot determine to what grand division the case belongs by the county or counties in which the parties reside, either plaintiffs or defendants, for it frequently may, and does, happen, that the parties reside in different grand divisions, and not unfrequently a part of the plaintiffs reside in one grand division and part in another, and so of the defendants. The same may be said as to the service of the process that issues from this court, in most cases. It cannot be the cause of action that locates the case, for it must and does often happen that the cause of action accrues in a county in one grand division, and the suit

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thereon is brought in a county in another grand division. What, then, will and does locate a case of appeal, writ of error or *supersedeas* in a grand division? It is, and must be, the county from which the cause is brought up for revision, the court below in which it was determined and from which it comes. This is disclosed by the record of the cause. In cases of this description the cause comes up to this court from the circuit court of the county in which the judgment, decree or order complained of was made, and thus the grand division to which the case belongs is, or may be, ascertained, and, as I conceive, it was only intended to be ascertained. But how can we locate or confine applications to this court for writs of prohibition *mandamus* and *habeas corpus*, in or to any particular grand division? The cause is commenced in this Court by application made thereto, by the party complaining, and although the Court holds three terms, still it is but the one Court, and its original jurisdiction and authority granted by the Constitution touching these writs and the granting of them, which is transcribed into the 4th section of the said act of the 11th of January, 1873, and is co-extensive with the limits of the State, when the Legislature, by law, made in pursuance of the Constitution, had clearly restricted the exercise of that jurisdiction, and sufficiently defined such restriction to make it manifest. Clearly this Court cannot beneficially or reasonably exercise original jurisdiction with effect in cases of writs of *mandamus*, *habeas corpus* and prohibition if the exercise of the jurisdiction is confined or limited in any case to the terms of the Court held in any one grand division. If that were so, in many cases it would necessarily be from three to five months after application was made for the writ before the Court could order it to issue, and in some cases it might be a year, no matter how urgent or important the case, and thus the very purpose and object of vesting this court with this important jurisdiction would be defeated.

The act of March 24th, 1873, relating to writs of *ha-*

*beas corpus*, before referred to, does not purport to amend or repeal any part of the act of 11th of January, 1873, and the language of the *habeas corpus* act employed in the 1st and 6th sections, before quoted, clearly contemplates the authority of the Court wherever sitting to issue the writ, and to hear the case at once, on the return thereof. This act was passed at the same session that the act in relation to the grand divisions was passed, and it is clear, from its language, that the Legislature did not then understand that such a case was or should be confined to any grand division. Cases over which the Court has original jurisdiction are not brought here from any county or division, for hearing and determination, but they are commenced and determined therein, and as to them there is but one division, and that embraces the whole state. This Court, therefore, as I think, is in no way or to any extent restricted or restrained, in exercising jurisdiction at any or all of its terms, in cases of prohibition, *mandamus* and *habeas corpus*, by the said 7th section of the said act of the 11th of January, 1873. It may grant a conditional writ or rule of *mandamus* or prohibition at one term, in one division, returnable to another term in a different division, and there finally act upon it. It may likewise issue one of said writs, in one division, returnable in any other, in any case, and then act upon it. This Court has, for these reasons, jurisdiction and authority to hear and determine this case at the present term, under the state of the law. I do not now determine whether the Legislature has authority to restrain or restrict the original jurisdiction of this Court, under the constitution, but only the fact that they have not, as yet, done so or intended to do so.

Buskirk, by his counsel (as has already been stated) insists that the return of Judge Ward to the rule is insufficient, and asks the court to award the writ of prohibition above referred to. The first question that presents itself in the determination of this proposition is,—is the writ of prohibition the proper and appropriate

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remedy in the case presented, even though Buskirk is entitled to be examined by the county court by virtue of the act of April 3, 1873, as claimed by his counsel which I do not now determine; because according to the view I take of the question, it is not necessary, and would, under the circumstances, perhaps, be improper. It is proper that I should here remark, that at the time the indictment was found against Buskirk, he was not entitled, as matter of right, before trial upon the indictment in the circuit court, to an examination of any description, upon the charge alleged against him in the indictment; and this continued to be so, as admitted by counsel *pro* and *con*, without any doubt until the passage of the said act of April 3, 1873. The Code of this State provides that when an indictment for felony is found against a person in the circuit court, the court shall award a *capias* against such person, and the *capias* is returnable to that court, and the officer making the arrest is required to deliver the prisoner to the court, if sitting, or to the jailor thereof, who shall receive and imprison him. See sections 14 and 18 of chapter 158 of Code of W. Va. A *capias* is the only process for the arrest of the accused the circuit court is authorized to issue upon an indictment for felony. This is true now and has been, continuously, since the first of April 1869. No amendment having been made to the provisions of the Code upon this subject. The effect and purport' of the provisions of the Code upon the subject are that when an indictment is found in a circuit court, charging a person with felony, the court shall award a *capias* against the accused, to bring him before the court to answer the indictment. Under the provisions of the Code and article 8, section 36 of the Constitution of this State and the 17th and 24th sections of the Schedule thereto, the circuit court had full and complete jurisdiction before and since the adoption of the Constitution, without doubt up to the passage of said act of 3d April, 1873, to proceed with the trial of Buskirk upon the indictment

to final judgment. Even though this act be valid in cases of charges of felony made *subsequent* to its approval, it may not affect the provisions of the Code or the law in force at its passage, or even the same provisions afterwards, when indictment is found against the accused in the circuit court, before he is arrested upon warrant and taken before a justice. But I do not now determine that question, but simply refer to *Chahoon's case*, 20 Gratt., 733, where some information can be had upon the question. That case was decided by a divided court. The question as to whether prohibition is the proper remedy in a case such as is presented by the return and record is important and interesting. Prohibition is a remedy which has been seldom adopted or resorted to in the courts of Virginia, or in this State, and but little light or information can be gathered from the reports of other States upon the question now under consideration. A court of examination, in cases of felony, similar and with similar powers in most material particulars to those provided in the act of the 3d of April, 1873, certainly existed in the State of Virginia from and before 1819 until after the commencement of the late civil war, and probably until the organization of this State in 1863. It has been frequently held by the Court of Appeals of Virginia before the formation of this State, that it was error to put a prisoner upon trial, on an indictment for felony, found by a grand jury in the circuit court, before examination of him for the offence in the county or corporation court, if such examination was properly claimed; and that for such error the final judgment of conviction by the circuit court, upon a verdict of guilty should be reversed upon writ of error. *Commonwealth v. McCaul*, 1 Va. Cases 300; *Com. v. Cohen*, 2 Va., Cases 158; *Angel v. Commonwealth*, 2 Va., Cases 231; *Hurst v. Commonwealth*, 5 Leigh, 715; *Page v. Commonwealth*, 9 Leigh 683. It is clear from the foregoing authorities that if Buskirk is entitled to be examined before the examining court provided by the act of April

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3, 1873, before the circuit court can try him for the felony for which he is indicted and held, and the circuit court does proceed to try him upon the indictment before such examination is had, and he is convicted, it will be error sufficient to require this Court to reverse the judgment of conviction upon a writ of error, on the error being properly shown by the record. A writ of error then from this Court in such case is a proper and legal remedy. This being so, the circuit court having jurisdiction of the subject, will prohibition lie to stop the trial of the case simply because the court erred, if error it was, in deciding that Buskirk was not entitled in that case to the examination by the county court before trial upon the indictment which Buskirk claimed and still claims. A proper determination of this case requires an examination and consideration of such authorities as are at hand touching that subject. In the 8th vol. of Bacon's Abridgement with notes and references to English and American decisions, published in 1861, page 206, it is stated, "As all external jurisdiction, whether ecclesiastical or civil, is derived from the crown and the administration of justice is committed to a great variety of courts, hence it hath been the care of the crown that these courts keep within the limits and bounds of their several jurisdictions prescribed to them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed; which issues out of the superior courts of common law to restrain the inferior courts, whether such courts be temporal, ecclesiastical, maritime, military, &c., upon a suggestion that the cognizance of the matter belongs not to such courts," &c. In the same book, page 210, this language may be found: "A writ of prohibition will not be granted, when the subject matter is within the jurisdiction of the subordinate tribunal; if error intervenes the remedy is by *certiorari*." *The People ex rel., Karr v. Seward*, 7 Wend, (N. Y.), 518. "It is clearly agreed that a prohibition doth lie as well to a temporal court,

as to the spiritual court of admiralty or other court, where proceedings are different from the common law, if such temporal court exceeds the bounds of its jurisdiction, or take cognizance of matters not arising within its jurisdiction." *Same book*, 230. "An action was brought in the hundred court for 40 s., in which action, the plaintiff confessed that he was satisfied one shilling, which being done with an intent to give that court jurisdiction, and to defraud the superior courts, a prohibition was granted." *Same book* 231; *Clarke v. Coke*, Palm. 564. "If there be several contracts between A and B, at several times, for divers sums, each under 40 s., but amounting, in the whole, to a sum sufficient to entitle the superior court to a jurisdiction, they shall be sued for in such superior court, and not in an inferior one, which is not of record." *Same book and page*. In the *same book*, page 233, it is said, "But when the matter is clearly within the jurisdiction of the inferior court, a mere error in the proceedings may be a ground of appeal or review, but not of prohibition." See also 2 H. Blackstone, 100; *State v. Wakely*, 2, *Nott and M'Cord*, (S. C.) 410. Though the power to issue writs of prohibition is conferred upon this Court both by the constitution and statute, the cases in which this power is to be exercised, are not defined, either in the constitution or the statute. For this, as in many other powers given by the constitution or statute "we are referred to that great repository of rules and precedents, the common law," which being in force before the adoption of the Constitution, was wisely continued in force by the 36th section of the 8th article of the constitution. On referring to the common law, we find that the object of the writ of prohibition is to restrain and prevent a court of peculiar limited, or inferior jurisdiction, from taking judicial cognizance of cases not within their jurisdiction. It usually issues from the court of King's Bench, and is directed to the judge and parties to a suit in an inferior

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court, commanding them to cease from the prosecution thereof, upon a suggestion, either that the case originally or some collateral matter arising therein, does not belong to that jurisdiction. 3 Bl. Com., 112. Beyond these two grounds, it seems the court will not interfere; and when the matter is within the general jurisdiction of the court below, and in the conduct of the trial they have not exceeded their authority, the court above will not, on an application for a prohibition, inquire whether they have decided right or not. Such being the nature and purposes of the proceeding by prohibition, it is obvious that it can only be interposed in a clear case of excess of jurisdiction, on the part of some judicial tribunal." See opinion of C. J. Shaw, in the case of *Washburn v. Phillips*; 2 Metc. (Mass.) 296, 299; 4 Durnford and East, 896, 397, 398 and 399.

The former Constitution of this State conferred upon the circuit courts of the various counties original and general jurisdiction of all crimes and misdemeanors, by the sixth section of the sixth article thereof. The present Constitution, in the twelfth section of the eighth article thereof, confers upon the circuit courts original and general jurisdiction of all felonies and misdemeanors. The circuit courts under the Constitution are the highest courts of general jurisdiction in the State. The third section of the act of the Legislature, passed December 21, 1872, also confers upon the circuit courts original and general jurisdiction of all felonies and misdemeanors. If it be conceded that the act of the third of April, 1873, is valid, and that it is applicable, under the circumstances, to the case of *Buskirk*, still for this Court to award the prohibition asked for, would be to extend the use of the writ to purposes and cases not authorized by the common law, and would establish a principle, which, if carried into practice would tend greatly to obstruct, and delay the administration of justice in the courts in a great variety of cases, not difficult to foresee; and that, too, in cases where there are other and appropriate reme-

dies to correct the error. The fourth section of the act of the eleventh of January, 1873, provides that this Court shall have appellate jurisdiction in criminal cases where there has been a conviction for felony or misdemeanor in a circuit court, &c., and the third section of the Constitution confers the same appellate jurisdiction upon this Court as is conferred by said act. The mode of exercising appellate jurisdiction by this Court, by writ of error, is also prescribed by the Constitution and laws. I am not aware that a writ of prohibition has ever been awarded in Virginia, or in this State, by any court, in a case similar, in principle, to that now before us.

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For the reasons above stated, the return of the judge of the ninth judicial circuit made to the rule in this case is sufficient in law and this Court refuses to award the prohibition prayed for; and the rule awarded in this case on the 25th day of June, 1873, by this Court, at its last term, held at the city of Wheeling, must be discharged and dismissed, and the preliminary prohibition awarded herein, at the same time, must be discharged and dismissed, with costs against Buskirk.

HOFFMAN, JUDGE, not concurring in the first question adjudicated in the foregoing opinion of HAYMOND, PRESIDENT, and PAULL and MOORE, JUDGES, filed the following opinion :

HOFFMAN, JUDGE:

The proceedings by *mandamus* and prohibition are supervisory ; and, though in form original, are, in their nature, appellate. The proceedings by *habeas corpus* generally partakes, somewhat, of the same character : and it is historically esteemed of eminent importance. For these reasons, I presume, jurisdiction of these classes of cases is conferred on the Supreme Appellate Court, established for final dispensation of relief.

By the Constitution adopted in 1863, it was declared that the Supreme Court of Appeals should have original

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jurisdiction in cases of *habeas corpus*, *mandamus* and prohibition: And that it should have appellate jurisdiction in civil cases, where the matter in controversy, exclusive of costs, was of greater value or amount than two hundred dollars; in other controversies, that were specified, the pecuniary value or amount involved in which is not definite; in *habeas corpus*, *mandamus*, and prohibition; and in criminal cases where there had been a conviction of felony or misdemeanor, in a circuit court: And such other appellate jurisdiction in both civil and criminal cases as might be prescribed by law. Art 6, sec. 8.

Early in the history of the State, the practice of counsel resident in different sections, conducting cases in the circuit courts, to argue them in the Supreme Court of Appeals, obtained extensively. But the facilities for travel between the northern and southern sections were by no means commodious. These, and perhaps other causes, influenced the Legislature to provide for terms of the Supreme Court of Appeals at places in different sections, and to assign to the terms at each place the business of the sections in which they should be held, except when one of the parties to the litigation should desire a hearing at the first term of the court without reference to the place of its sitting.

Accordingly, in February, 1871, an act was passed, providing that two sessions of the Supreme Court of Appeals should be held in every year, one in Charleston to commence in January, and one in Wheeling, to commence in July: And that no case from any of the counties composing the first, second, third, fourth, fifth, sixth and eighth circuits should be heard at the sessions to be held at Charleston; and no case from any of the counties composing the seventh, ninth, tenth, eleventh, twelfth and thirteenth circuits should be heard at the sessions to be held at Wheeling; except by consent, in writing of the parties by their counsel, unless the party desiring a hearing should have given written notice to the opposite party, or his counsel, at least thirty days before the

term, of his intention to insist on a hearing. Acts 1871, <sup>1873,</sup> ch. 80, p. 108. <sup>August Term.</sup>

In February, 1872, the second section of this act was amended and re-enacted, so as to prohibit cases from the counties composing the ninth circuit from being heard at the session to be held at Charleston, except by consent, unless a party should give such notice as before mentioned; and to allow the cases from these counties to be heard at the session to be held at Wheeling. Acts 1872, ch. 33, p. 43. <sup>Buskirk  
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The Court at once recognized the power of the Legislature to enact this regulation; and thereafter observed and acted on it as a rule of practice—at least as far as it applied to appellate cases. I am not advised that the court had occasion to act on the subject in any original case.

The former Constitution having been by the Legislature and the Court so practically construed, the constitution adopted in 1872 contains the same provision conferring jurisdiction on the Supreme Court of Appeals; except that it extends the appellate jurisdiction downward to cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars, and confers it in criminal cases where a conviction has been had in an inferior court which has been affirmed in a circuit court; and this Constitution does not declare that the Court shall have such other jurisdiction, as may be prescribed by law. Article 8, sec. 3.

Under the general power to make laws, conferred by the Constitution, I suppose the Legislature may regulate the practice of the Supreme Court of Appeals, in cases of both original and appellate jurisdiction; though not so as to obstruct the exercise of the jurisdiction conferred by the Constitution on the Court. I have not heard such power seriously controverted.

With this legislative understanding of the subject, in January, 1873, the act was passed, entitled, "An act organizing the Supreme Court of Appeals, defining its ju-



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isdiction and powers, and prescribing its manner in proceeding." By this act it is provided that three sessions of the court shall be held every year;—one in Charleston, commencing in January; one in Wheeling, commencing in June; and one in Charlestown, commencing in August: And, in conformity with the Constitution, it is declared that the original jurisdiction of the Court shall extend to cases of *habeas corpus*, *mandamus* and prohibition: And that the appellate jurisdiction shall extend to civil cases where the matter in controversy, exclusive of costs, is of greater value or amount, than one hundred dollars; and other civil controversies and cases of classes that are specified, and criminal cases, where there has been a conviction for felony, or misdemeanor, in a circuit court, or a conviction in an inferior court affirmed in a circuit court: And, by the act, it is provided that the State shall be divided into three judicial grand divisions: That the first division shall consist of the counties composing the first, second, fifth and sixth judicial circuits; the second division shall consist of the counties composing the third and fourth judicial circuits; and the third division shall consist of the counties composing the seventh, eighth, and ninth judicial circuits: And that each case shall be heard and determined in its own grand division, except by consent of parties or their counsel, in writing, unless the party desiring a hearing shall having given written notice at least thirty days before the commencement of the term, to the opposite party, or his counsel, of his intention to insist on a hearing—when the case may be heard and determined out of its own grand division. Acts 1872-3, ch. 16, secs. 3, 4 and 7.

This Court, from its organization under the present Constitution, has heard, and still hears, appellate cases in no other than their own judicial grand division, except by consent, or upon notice. And so the Court recognizes the power of the Legislature to prescribe the places and terms at which cases from different counties

of the State shall be heard; and, no one within the range of my information, denies the authority to enact the regulation.

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An act was passed in December, 1872, by the same Legislature, by which the act just mentioned was passed, "regulating appeals, writs of error, and *supersedeas*." Both the bills on these subjects were before the Legislature at the same time. The provision, however, as to the judicial division in which cases shall be heard, was incorporated, not in the act relative to appellate cases alone, but in the act regulating the powers and proceedings of the Court in all cases.

The dividing of the State into "judicial grand divisions," with the other enactments mentioned, indicates the legislative intent that the general business of the Court—not merely the appellate business—shall be transacted at the different sessions within the respective divisions, according to the regulations prescribed. There is, perhaps, stronger reason why writs of error in criminal cases should be heard without delay, than any other cases, original or appellate. But, when the Legislature, mentioning all the different classes of cases of which the court has jurisdiction, declares, generally, that each case shall be heard in its own judicial grand division, I cannot readily construe it to intend that the rule shall be limited to civil appellate cases alone, or to all appellate cases—and not be applied to the hearing of any other class of cases.

The language of the law—that "each case shall be heard in its own grand division," unless special action be taken in order that it may be heard elsewhere—is, plainly and unequivocally applicable to cases in which the Court exercises original, as well as to those in which it exercises appellate jurisdiction. No grammatical principle admits the exclusion of this provision from application to the one or the other class of cases. Though such principle, or the want of it, be not absolute to control the construction of this or any law, it should not be disregarded without cogent reason.

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The remedy by *mandamus* or prohibition, extends to cases of small, as well as those of large importance ; while that by writ of error, *supersedeas* or appeal, extends, and is daily enforced, not only in cases involving the largest sums and amounts of money and property litigated, but cases involving the lives, liberties and immunities of citizens.

Without consideration, I suppose a party entitled to relief by *mandamus* or prohibition may have it in a circuit court, in most, if not in all cases, in which he may have it in this Court ; and, in any such case decided by a circuit court, he may have a writ of error or *supersedeas* from this Court to such judgment, except when he invokes the power of this Court to coerce or prevent the action of a circuit court.

As far, then, as I comprehend the subject, cases of *mandamus* and prohibition, if not less, are certainly not more important than those of the writ of error, *supersedeas* or appeal ; and they do not demand greater sacrifice of the convenience of parties or counsel, or more prompt action of the court. And there is no strong reason, if there be any, why the former classes of cases should be heard at any term of the Court, rather than the latter.

This Court may, at any term, award a rule to show cause why a writ of prohibition should not issue ; and the rule will operate as a prohibition till the case shall be regularly heard and determined.

And, according to the act, the parties may consent, or any party may give notice thirty days before the commencement of a term, and have an original, as well as an appellate case, heard out of its grand division.

The proceeding by *mandamus* or prohibition is generally against a court, or officer, sitting or acting at a place fixed by law. In *mandamus*, the place where the act should be performed, or, in prohibition, the place where it is about to be performed, may furnish the criterion as to the division in which it shall be heard, as in a writ of error, *supersedeas* or appeal, the place where the

judgment or decree was rendered, furnishes it Or, per-  
 haps, there may be cases in which, under the statute, a  
 different test may prevail. As far as I see, there is no  
 insuperable difficulty in applying the provision in ques-  
 tion to the case of *mandamus* or prohibition. In most  
 cases the application would be easy, while in all, I think,  
 it would be practicable.

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The nature of the remedy by *habeas corpus*, as recog-  
 nized in the Constitution, may be paramount to the leg-  
 islative regulation as to the place in which cases shall  
 be heard; or the act passed in March, 1873, by the same  
 Legislature already referred to, may control or supersede  
 that regulation, as to that remedy; to which alone the  
 act relates. I do not stop to consider either of these  
 questions. But I do not think any inappropriateness of  
 the provision of the act now under consideration to cases  
 of *habeas corpus*, is sufficient to exclude it from applica-  
 tion to cases of *mandamus* and prohibition.

While, then, as has already been said, the language of  
 the statute, in this respect, clearly relates to these, as  
 well as to all other cases of which the court has jurisdic-  
 tion, I do not find any reason so conclusive, in my un-  
 derstanding, as to induce us to disregard its purport and at-  
 tribute to the language a restricted meaning.

For the reasons suggested, I do not concur in the  
 opinion or conclusion stated by the President and con-  
 curred in by the other Judges, on this point.

I concur in the opinion and conclusion on the other  
 points decided.

WRIT OF PROHIBITION DENIED.

# CASES DETERMINED

IN THE

## SUPREME COURT OF APPEALS OF WEST VIRGINIA,

AT THE JANUARY TERM THEREOF, HELD AT CHARLESTON, IN THE COUNTY OF KANAWHA, COMMENCING ON THE FOURTEENTH DAY OF JANUARY, 1874, AND ENDING ON THE THIRD DAY OF MARCH 1874.

### CHARLESTON.

FORQUERAN v. DONNALLY.

February 23, 1874.

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1. Where a chancery suit is heard on bill and answer, and there is no replication to the answer, and the defendant has not taken depositions as if there was a replication, the answer will be taken as true, so far as it is material and relevant.
2. A purchaser of a part of a tract of land at a sheriff's delinquent tax sale, made in the year 1860, by the purchase, payment of the purchase money and delivery to him of the sheriff's receipt therefor, acquired the right, if the land was not redeemed in the manner prescribed by the 13th section of chapter 37 of the Code of Virginia, within two years from the sale, to obtain a deed in the mode and manner prescribed by the 15th and 17th sections of said chapter, without the privilege to the former owner to redeem until after the expiration of the one year from the expiration of the two years, without the deed having been made to the purchaser.
3. The right, so acquired, grew directly out of the contract of sale made in pursuance of the law under which it was made. The contract

was a civil contract. This right is an equitable right, or interest, entitled, on the failure to redeem, to ripen into a full legal title. 1874.  
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4. That such parts of chapter 37 of the Code of Virginia as were material and substantial parts of the contract of sale of a tract of land for taxes, sold by the sheriff, thereunder, in 1860, should be held to remain and continue in force, as to such contracts, in connection with the act of the Legislature entitled "An act providing how lands heretofore or hereafter sold, and not redeemed, shall be surveyed and conveyed," passed on the 7th day of October, 1863, notwithstanding the provisions of the 32d section of the act of the Legislature passed on the 27th day of February, 1866, entitled "An act to provide for the sale of real estate returned delinquent for the non-payment of taxes."
5. The said act of 1863 was not repealed by the said act of 1866 or by any section of said act.
6. Several statutes, *in pari materia*, and relating to the same subject, are to be taken together and compared in the construction of them, because they are considered as having one object in view and as acting on one system. And the rule applies though some of the statutes may have expired, or are not referred to in the other acts.
7. Statutes are not considered to be repealed by implication, unless the repugnance between the new provision and a former statute be plain and unavoidable.
8. A construction which repeals former statutes or laws, by implication, and divests long approved remedies is not favored by the courts.
9. Courts will not readily intend, where the Legislature enacts a general law upon a given subject and repeals an existing general law of like character, upon the same subject, that it was the intention of the Legislature, by the repeal, to deprive those who acquired just rights or interests, under the old law, of all remedy, or to extinguish their rights or interests unless such intention is manifest. But courts may properly, in such case, rather than the parties should be left without remedy, intend that the proceeding, or remedy, provided by the new law, as far as practicable, was intended by the Legislature to be applied to rights and interests acquired under the old law.
10. Where less than the whole tract of land was sold by the sheriff for delinquent taxes, in the year 1860, and a deed was made by the Recorder of the county in which such sale was had, under the said act of 1863, and proceedings had according to its provisions, after the passage of the said act of 1866, and no survey and plat of survey was made and returned, as required by said act of 1863, prior to the execution of such deed, and reference to such survey

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and plat is not made in the deed as having been made and returned—such deed, for this cause, does not pass the title of the former owner, and is void.

11. The equitable right, or interest, of the purchaser, in such case, where he paid the purchase money and received the sheriff's receipt, was secured by the first section of the 9th article of the Constitution of 1868.
12. While the deed aforesaid was, and is, not valid to pass title still the equitable title or interest in the land, subject to the right of redemption, did not become extinguished by the deed being invalid, but was in existence at the adoption of the Code of 1868; and when it took effect it was competent for the Legislature to pass laws by which the purchaser could obtain a sufficient deed for the land purchased by him at the said tax sale. And the 24th section of chapter 31 of the Code of 1868 does provide such remedy; but the deed under that section must have been made within two years from the passage of said Code, where the sale occurred more than five years before the passage of the Code; and the owners, their heirs and assigns, had the right to redeem at any time before such deed was made. If the purchaser, or his heirs or assigns, cannot show that he or they, properly procured a proper and sufficient deed for the land purchased at said tax sale, within two years from the 29th day of December, 1868, the date of the passage of said Code, then it must be considered and held, that the equitable right or interest of the purchaser, acquired by his said purchase, has been extinguished.
13. The 40th section of the 31st chapter of the Code does not cure or validate, the deficiency or defect in the said deed, made by the Recorder, the decree in the suit being made on the 18th day of April, 1869, only a few days after the Code took effect, and perhaps would not cure or validate the defect under any other circumstances.

This was an appeal by Matthew P. Wyatt and Jacob M. Kelly, from a decree rendered by the circuit court of Kanawha county, on the 16th day of April, 1869, in a suit in chancery therein pending, wherein William A. Forqueran was complainant and the said Matthew P. Wyatt and Jacob M. Kelly and Charles P. Brown and Sarah A., his wife, Sally W. Craig, John Tyler and Martha Jane, his wife, John W. Morrison and Mary E., his wife, John D. Forqueran, Mary Rust, Susan Forqueran, Andrew F. Donnally, William Donnally, Lewis F. Donnally and John B. Crawford were respon-

dents. The decree below was pronounced by the Hon. Robert S. Brown, judge of the tenth judicial circuit, under the judicial division of the State, as provided by the act passed July 17, 1868.

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The facts in the suit, and the statutes and constitutional provisions, the construction of which are involved in the opinion of the court, are sufficiently set forth therein.

*Miller & Quarrier* and *John L. Cole* for the appellants.

*Smith & Knight* and *William H. Hogeman* for the appellees.

HAYMOND, PRESIDENT:

The defendants Wyatt and Kelly in their answer simply say that they "claim" one hundred and ten acres of the land in the bill mentioned, as will appear by their deed from the Recorder of Kanawha county, therewith filed marked "W." The cause was heard upon this answer without any replication thereto. The defendants took no depositions, but they filed with their answer an official copy of the deed therein referred to; and also filed copies of certain papers and proceedings in the deed mentioned. The circuit court of Kanawha county on the sixteenth day of April, 1869, rendered the decree appealed from; and in the decree, among other things, it is recited, that the cause was heard upon their answer. In the decree the court declares that "the deed made on the fourth day of April, 1866, from the Recorder of Kanawha county to the defendants Matthew P. Wyatt and Jacob M. Kelly, is void and of no effect, as in the opinion of the court at the date of said deed there was no law in force authorizing such deed to be made for lands sold for taxes prior to 1865." The deed here referred to is the same mentioned in the answer of Wyatt and Kelly. The court upon declaring the deed void provided in the same decree for partition of the land in the bill mentioned, between the other parties, excluding Wyatt and Kelly therefrom. Generally where a cause is heard on bill and answer and there is no replication to the answer,



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the answer will be taken as true, as to the matters of fact material, responsive and relevant therein stated, where depositions have not been taken by defendants therein. But in this case I think it clear that Wyatt and Kelly, by their answer, in effect, only submitted to the court a simple claim based upon the deed therewith filed, exclusively, subject to the opinion of the court as to the validity and effect of the deed, taking the facts and statements therein as true. This seems to have been the view of the court below as to the effect of the answer. It appears that Andrew F. Donnally and William Forqueran, in 1833, became the joint owners, in fee simple of a tract of land containing three hundred acres, more or less, in Kanawha county—that Andrew Donnally, in his lifetime, conveyed his moiety of the land to his three sons A. F., William and Lewis F. Donnally—that Lewis F. Donnally afterwards conveyed his interest, acquired from his father, to said A. F., and William Donnally—that William Donnally died intestate and without having conveyed his moiety of the land; and the plaintiff and others are his legal heirs. This suit was brought to have partition of said tract of land between the plaintiff and others who were thereto entitled, and Wyatt and Kelly were made defendants by an amended bill in which it is alleged that they asserted some claim to the land, the nature of which was unknown to the plaintiff. The only question presented for the determination of this court is, what right, if any, Wyatt and Kelly, or either of them have in and to the land in the bill mentioned, or any part thereof under and by virtue, of the deed for the one hundred and ten acres filed with their answer, and under the laws passed by the Legislatures of Virginia and West Virginia touching the subject of lands returned delinquent and sold by a sheriff for taxes. By reason of confusion in the legislation of this State, prior to the decision of this cause by the court below, in relation to the tax sales of 1860, made by sheriffs, the question presented, though important in many aspects, is

complicated and difficult of satisfactory solution. It is indispensable to a proper understanding of the subject that the various laws enacted in relation thereto, should be recurred to, and the policy and purposes of the Legislature in connection therewith, carefully considered. Owing to the great confusion of the titles to lands in many parts of this State which grew directly out of an unwise policy of the mother State (Virginia) in relation to her vacant, delinquent and other lands, at an early day, in her history and for many years subsequent thereto, the title to lands in parts of this State, as the direct result of that policy, became greatly complicated and uncertain, and I regret that in many places, at this day, much of that complication and uncertainty still exists. While this State derived great complication and uncertainty in her land titles, from the legislation and policy of the mother State, at an early day, after a careful examination of the legislation in relation to sales of land for taxes, and especially the sales made in the year 1860, I am compelled to admit, though with great regret, that some of the legislation of this State prior to and including parts of the Code of 1868, which took effect the 1st day of April, 1869, has added new and serious complications as to some lands. Notwithstanding these facts I am gratified to know that the condition of the titles to the great body of the lands within this State is much better than it was some years since. Time and the salutary operation of the statute of limitations, touching real, actions, have contributed much in bringing about this great and good result, and the legislation and organic law touching waste, forfeited and delinquent lands, have heretofore and are now contributing much in the same direction. In many parts of the State the title to lands is now well settled, and certain prior subsisting shadows and clouds have passed away, and there can be no reasonable doubt that wise and discreet legislation touching forfeited and delinquent lands, together with the statute of limitations, administered promptly,

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discreetly and firmly by the courts, will soon work the same sound condition of land titles in those parts of the State where confusion and uncertainty now exist.

The 8th section of the 11th article of the first constitution of this State, which took effect June 20th, 1863, provides that "such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature," &c. The 18th section of chapter 16, of the Code of Virginia of 1860, was in force within the boundaries of this State when that Constitution went into operation, and is in these words, viz: "No new law shall be construed to repeal a former law, as to any offence committed against the former law, nor as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or or any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." This section was, and is, in no wise repugnant to the constitution, and continued in force until the Code of this State, enacted in 1868, took effect; and the first section of chapter 166, which is the last chapter of that Code, provides that the provisions of the preceding chapters shall be in force upon, and after, the 1st day of April, 1869; and repeals all acts and parts of acts of a general nature in force on the day preceding that day, subject to

such limitations as may be prescribed by law. The 2nd section of same chapter provides that "Such repeal, except when it is otherwise provided in this act, shall not affect any act done, or forfeiture incurred, or any right established, accrued, or accruing before the said first day of April, eighteen hundred and sixty-nine; or suit or proceeding, pending on that day, save only that the proceedings thereafter shall conform, as far as practicable, to the provisions of the foregoing chapters of this act." The 3d, 4th, 5th, 7th, 9th, 10th, 11th, 12th, 13th, 15th, 16th, 19th, 21st, 22d and 23rd sections of chapter 37 of the Code of Virginia of 1849, which were in force in 1860, and are contained in the Code of 1860, substantially provided that when lists of real estate, delinquent for non-payment of taxes, had been by the auditor delivered to the sheriffs, notice should be published that the real estate, or so much thereof as should be necessary to pay the taxes and charges, should be sold, at a time specified: that if the taxes and charges were not previously paid, the sheriff should make sale accordingly, that the sheriff, on receiving from the purchaser the amount of purchase money, should grant to him a memorandum of the sale, particularly setting forth the material facts relating to the land, the tax and the sale, to which should be annexed a receipt for the purchase money: that the sheriff should make a list of the real estate sold, setting forth the material facts, annexed to which should be an oath subscribed and taken by the sheriff: that the list with the certificate of the oath attached, should be returned to the court of the county: and that if the court saw no cause to doubt the correctness of the list, it should order a copy to be certified to the auditor: that the owners, or others, might redeem the real estate within two years from the sale; that the purchaser of a part of a tract of land, so sold, and not redeemed within the said two years, his heirs and assigns should have the quantity purchased, surveyed and laid off at his expense, by the sur-

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veyor of the county ; or where there should be no county surveyor, then by some person to be appointed by the court of the county for that purpose ; the said survey to commence on either of the lines of the tract, at the option of the purchaser his heirs or assigns, so as not to include the improvements on the same (if it could be avoided), and to be in one body, the length whereof shall not be more than double the breadth, when that is practicable : that a plat and certificate of the survey shall be returned to the court of the county ; and if the court upon examination thereof found it to be correctly made, in conformity with the section, it should order the same to be recorded : that when an entire tract of land was sold, and not redeemed, within that time, the purchaser might have a report made by the surveyor of the county to the court thereof, specifying the metes and bounds of the land sold, and the names of the owners of the adjoining tracts, and giving such further description as will identify the land ; and that the court, unless it should see some objection to the report, should order it to be recorded : that after the expiration of the two years, the purchaser of land not redeemed might obtain from the clerk of the court of the county a deed in which should be set forth the circumstances appearing in the clerk's office in relation to the sale : that if the sale be of a part of a tract of land, the deed should refer particularly to the plat and certificate of survey. returned according to the 15th section, and the order of court thereupon ; and if the sale be of an entire tract of land, it shall refer to the report made according to the 16th section, and the order thereupon : that when the purchaser has assigned the benefit of his purchase, the deed might, with his assent, evidenced by his joining therein or a writing annexed thereto, be executed to his assignee ; that if the purchaser shall have died, his heirs or assigns may move the court of the county, or corporation (whose officer made the sale) to order the clerk, or a presiding justice to execute a deed to such heirs or assigns : that if no

such deed or order of court, should be made within one year after the expiration of the two years mentioned, the former owner might, after such year, and before a deed was made, redeem the land : that when the purchaser of any real estate so sold, his heirs or assigns shall have obtained a deed according to the 17th, 18th, 19th, 20th, 21st and 22d sections, and within six month from the date of such deed shall have caused the same to be recorded in the court of the county, or corporation, in which such real estate shall lie, such estate shall stand vested in the grantee in such deed, as it was vested in the party assessed with the taxes (on whose account the sale was made), at the commencement of the year for which the said taxes were assessed, notwithstanding any irregularity in the proceedings under which such grantee claims title, *unless such irregularity appear on the face of the proceedings*. And if it be alleged that the taxes for which the sale was made were not in arrear, the party making such allegation must establish the truth thereof by proving that the taxes were paid.

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The State, by law of long standing, had a lien for the taxes on land which she might, under such legislation as I have referred to, enforce by sale. These laws, and similar laws, have been authoritatively held to be constitutional. *Wild's Lessee, v. Serpell*, 10 Gratt. 405; *Flanagan v. Grimmer*, 10 Gratt., 421; *Levasser v. Washburn*, 11 Gratt., 572; and numerous other cases adjudicated by the Supreme Court of Appeals of Virginia and of this State : and the decisions in other States might be cited, but it is deemed unnecessary.

On the 4th day of Feb., 1862, the Legislature of the Restored Government of Virginia passed an act amending and re-enacting section 14 of said chapter 37 of the Code of Virginia. The change made in section 14 of said chapter 37 is not material to this case, and it is unnecessary further to notice it here.

By the Constitution of 1863, of this State, the county court which previously existed within her limits, under

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the Constitution and laws of Virginia, was dispensed with and ceased to exist. But chapter 37 of the Code, as amended by the act of 1862, continued in force, except those parts of it which became practically inoperative by reason of the non-existence of county courts. In the absence of county courts and clerks of such courts, the purchasers of land sold by sheriffs for taxes in the year 1860, who had not obtained deeds prior to the time the Constitution of 1863 of this State took effect, were left without remedy, or provision of law, by which they could obtain such deeds. In order to supply this subsisting deficiency in the law, the Legislature of this State, very properly and justly, on the 7th day of October, 1863, soon after the Constitution of the State took effect, passed an act entitled "An act providing how lands heretofore or hereafter sold and not redeemed, shall be surveyed and conveyed." In this act it is provided that "what is authorized to be paid under the 14th section of chapter 37 of the Code of Virginia (ed. of 1860), to the clerk of any court of any county, may be paid to the Recorder of the county. Any plat and certificate or report to be returned, or made to any county court under the 15th and 16th sections of said chapter, shall be returned or made to the circuit court of such county, or to the judge thereof in vacation. Any proceedings or order to be had or made, in or by the county court of any county, according to the provisions of said chapter, shall be had or made by the circuit court of the county, or by the judge thereof in vacation. Any order made by virtue of this act by a judge in vacation, shall be returned by him to the clerk of the circuit court of the county wherein the sale was made, and shall be, by such clerk, forthwith entered of record in the law order book of said court. Any deed to be made under said chapter by the clerk, or deputy clerk, of the county court, shall be made by the Recorder of the county, unless he is interested; and then it shall be made by the clerk of the circuit court of the county; in which deed shall be set forth all the circumstances

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appearing in the circuit court clerk's office, or in the Recorder's office, in relation to the sale, and it shall conform in all other respects to the requirements of said chapter. Deeds required by said chapter to be recorded in the court of any county, shall be recorded in the office of the Recorder of the county."

On the second day of March, 1865, the Legislature passed an act entitled "An act to provide for the sale of certain lands for the benefit of the School Fund." There is but one section of this act which has any reference or application, whatever, to the subject under consideration, and that is the eleventh section thereof, which provides, that "Any person who may have purchased any real estate at a sale thereof made in the year 1860, for the taxes due thereon, and who has failed to obtain a deed therefor, either by reason of the loss of the receipt of the sheriff for the purchase money, or by the failure of the sheriff to give such receipt, may file his petition in the circuit court of the county in which such real estate, or any part thereof may be, setting forth the person in whose name such real estate was sold and the amount due thereon at the filing of such petition; and the reason why he had not obtained such deed. If the court shall be satisfied of the truth of the facts stated in said petition, it shall order a deed to be made to such purchaser, for said real estate, in the manner prescribed in chapter thirty-seven of the Code of Virginia, upon the payment to the sheriff of all taxes due thereon." This section does not apply to the case under consideration because the sheriff did give the purchaser a proper receipt for the purchase money, and the receipt is in existence, and is not pretended or claimed, to have been lost at the time the proceedings hereinafter referred to were had before the circuit court of Kanawha county, with a view to obtain the deed from the Recorder, filed with the answer and on which the deed seems to have been predicated. At the time of the passage of the last named act the Legislature considered



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It must be admitted that under the provisions of the thirty-seventh chapter of the Code of Virginia, and of the said act of 1863, the Legislature had attempted to make, and had made, ample provision whereby purchasers of land sold for taxes at sheriff's sales in 1860, which had not been redeemed, could obtain proper deeds vesting them with such title as is mentioned in said thirty-seventh chapter. But on the twenty-seventh day of February, 1866, the Legislature passed chapter ninety of the acts of 1866, entitled, "An act to provide for the sale of real estate returned delinquent for the non-payment of taxes." See Acts of 1866, page 85. The thirty-second section of this act reads thus: "Chapter thirty-seven of the Code of Virginia, second edition, and chapter fifty-four of the acts of the General Assembly of Virginia, passed February 4, 1862, are hereby repealed." This act in no way refers to the said act of 1863, or to the eleventh section of said act of 1865, or any part of that act. By the act of 1866 said chapter thirty-seven and the act of 1862, amending the fourteenth section of that chapter were swept out of existence as laws, *for every purpose*, the appellees contend. The act of 1866 in no way refers expressly to or mentions lands sold for the non-payment of taxes prior to its passage, except for the year 1865, and all that is contained therein in reference to the sales made in that year is contained in the last section, which is section thirty-three, and which reads thus: "Lands sold in the year 1865, for the non-payment of taxes shall be redeemed according to the provisions of this act, and if not so redeemed, conveyances shall be made to the purchaser thereof according to the provisions of this act." There had been no sales of lands for the non-payment of taxes between 1860 and 1865, and could not have been under any law. The sales of lands for the non-payment of taxes in the year

1865 were made under and by virtue of the provisions of said chapter thirty-seven of the Code of Virginia, and the amendments thereto made, by the said acts of 1862 and 1863. There was no other law in force by which the sales could have been made. The act of 1866, and its title, with the exception of section thirty-three, above quoted, upon its face, seems to provide for sales to be made in the future, though most of its material provisions are substantially the same as those in said chapter thirty-seven, and sections fourteen, fifteen and sixteen of the act are substantially the same as sections fifteen, sixteen and seventeen of chapter thirty-seven; except the plat and certificate of the survey and the report are to be returned to the Recorder, instead of the county court, and the Recorder is authorized to make the deed instead of the clerk of the county court. The first section of the ninth article of the Constitution of this State, provides, that, "all private rights and interests in lands in this State, derived from or under the laws of the State of Virginia, prior to the time this Constitution goes into operation, shall remain valid and secure, and shall be determined by the laws heretofore in force in the State of Virginia."

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In this state and condition of the legislation and the law, the defendant Kelly, who became the purchaser at the sheriff's sale in Kanawha county, of the 110 acres of the tract of land in the bill mentioned, which was, and is, a part of a larger tract returned delinquent for the non-payment of the taxes due thereon to the State of Virginia, for the year 1859, in the name of A. F. and Wm. Donnally and Forqueran's heirs, and who by endorsement on the receipt of the sheriff, given for the purchase money, assigned one-half of the same to the defendant Wyatt. The assignment has no date to it, but it appears that after it was made, John L. Cole, surveyor of Kanawha county, at the request of defendants Kelly and Wyatt, made a report, accompanied by a plat, to the circuit court of Kanawha county, specifying the

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metes and bounds of the land sold and the names of the of the owners of the adjoining tracts, and thereupon the court made an order reciting, substantially, that on the 3rd of April, 1866, John L. Cole, surveyor of Kanawha county, made report to the court, accompanied by a plat of a tract of land containing 110 acres, lying on Field's creek in said county, being part of 200 acres delinquent for taxes thereon, due the State of Virginia for the year 1859, in the names of A. F. and Wm. Donnally and Forqueran's heirs, and offered for sale by E. S. Arnold, sheriff of the aforesaid county, on the 17th day of September, 1860, at which sale defendant J. M. Kelly became the purchaser of the 110 acres, part of the 200 acres aforesaid, for the sum of \$2.05—the amount of the taxes due on said 200 acre tract, and the said Kelly having assigned one half of the 110 acres to Matthew P. Wyatt, all of which appears by the receipt of the said sheriff, filed with the plat and report; and it appearing that the said plat and report are correctly made and are in conformity with the requirements of law; it is therefore ordered that the said plat and report be recorded and that the Recorder of this (Kanawha) county do execute a deed for the said tract of land to the said J. M. Kelly and Matthew P. Wyatt, jointly, as provided by law. No survey of the quantity purchased was made by the surveyor; and no certificate of survey was returned with the plat to the circuit court or to the Recorder. Afterwards the Recorder of Kanawha county made a deed to Wyatt and Kelly for the one hundred and ten acres of land described in the order of the circuit court. This deed is dated the fourth of April, 1866, was acknowledged by John Slack, who signed the same as Recorder, before a justice, on the 12th day of April, 1867, and admitted to record in the Recorder's office of Kanawha county on the same day. The deed recites the quantity of the land sold to be one hundred and ten acres, part of two hundred acres of land returned delinquent for taxes "in

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the year 1859," in the name of A. F. and Wm. Donnally and Forquernan's heirs, and described as lying on Fields' Creek—that the amount of taxes due thereon was \$1.68, and the amount paid by Kelly to the Sheriff, as purchase money, for the one hundred and ten acres was \$2.05, which appears by receipt of the Sheriff, E. S. Arnold, herewith intended to be recorded and, also, by the list of sales of such real estate returned by said Sheriff, and then on file in the office of the Recorder, which receipt is endorsed as follows: "I assign one half of the within to M. P. Wyatt.—J. M. Kelly." It then refers to the said order of the circuit court, and states correctly the order of the court, except that it does not state or show on its face the year for which the land was returned delinquent, but that it was returned delinquent in the year 1859. The deed also gives the boundaries of the land, in accordance with the report of surveyor Cole, as the report appears in the record. It no where appears in the record that the plat and report, or either of them, or the receipt of the sheriff for the purchase money, were ever recorded in the Recorder's office, or elsewhere. After these proceedings the Code of this State of 1868 was enacted, which took effect on the 1st of April, 1869, just fifteen days prior to the date of the decree in this cause. The 15th section, of chapter 31, of this Code, provides that the land sold may be redeemed within one year of the sale thereof. The 17th and 18th sections are substantially the same as the 14th and 15th sections of the act of 1866. The 23d section provides that if the purchaser shall have died, the Recorder may make the deed to his heirs, or assigns. The 24th section provides that if no such deed be made, within one year after the right to redeem the estate shall expire, the former owner, his heirs or assigns may, after such year, and before the deed or order, mentioned in the 22d section is made, redeem the land. But no such deed shall be made or obtained, after five years from the

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date of the sale; except that where the sale was made before the passage of the Code the deed therefor may be made within two years after the date of such passage. The 19th section is substantially the same as the 16th section of said act of 1866, and it is substantially the same as section 17, of said chapter 37, except that the Recorder is directed to make the deed, instead of the clerk of the county court. The 40th section of said chapter 31, of the Code of 1868, provides that, "Lands sold in the year 1860, and in any year subsequent thereto, and before the year 1869, for the non-payment of the taxes thereon, shall be redeemed according to the provisions of this chapter, and if not so redeemed, conveyances shall be made to the purchasers thereof, their heirs or assigns, in the same manner, and with like effect as if this chapter had been in force when the sale was made, and the proceedings had been according to its provisions. All deeds for real estate sold in the year 1860 for the non-payment of taxes thereon, made since the 27th day of February, 1866, are hereby legalized and made valid, and shall have the same force and effect, in all respects, as a sale, deed and other proceedings hereafter made and had, according to the provisions of this chapter, except that the former owner of such real estate, his heirs or assigns may, within one year after the passage of this act, redeem the same, in all respects, as if no such deed had been made. And it shall be the duty of the person having the legal title to such real estate, derived through any such deed, to re-convey the same to such former owner, his heirs or assigns, upon the payment or tender, to him, of the sum required to redeem the same, and the costs attending such conveyance, within the said one year, and upon his failure or refusal to do so, the circuit court of the county shall order such deed to be made by the Recorder, or a commissioner appointed for that purpose, by such court, at the cost of the party so refusing. No person shall in any suit, not brought for the purpose, within one year after the pas-

sage of this act, or otherwise, after the expiration of that time, question the validity of such sale or deed, or of any sale or deed, heretofore made, or avoid or impair, the effect thereof to pass the complete title to the real estate sold, for any cause that would not be sufficient and proper to avoid a sale or deed, hereafter made, under the provisions of this chapter. Nor shall any person be permitted to prove the payment of taxes, or on account of such payment question the validity of such sale or deed, except within five years from the passage of this act, as provided in section 27, of this chapter. Provided that real estate sold in the year 1867, for the non-payment of taxes thereon may be redeemed at any time within two years from the day of sale."

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Having stated the provision of the Constitution of 1863, and all the facts and legislative enactments bearing upon the questions presented for determination in this cause, so far as they are now known to me, I will proceed to consider those questions which I deem it proper to decide.

The questions will be considered as follows:

*First.* Did Kelly acquire any right or interest in and to the 110 acres of land, part of the land in the bill mentioned, by his purchase at the sale made by the sheriff of Kanawha county, on the 17th day of September, 1860, under, and by virtue of, the laws of the State of Virginia, in force at the time of the sale, and if so, what was, and is, the nature and character of that right or interest?

*Second.* Was that right secured by the first section of the 9th article of the Constitution of this State, taking effect in 1863?

*Third.* Was the deed, dated the 4th day of April, 1866, from the Recorder of Kanawha county to Wyatt and Kelly void and of no effect when executed, and prior to the first day of April, 1869, when the 31st chapter of the Code of this State took effect, because at the date of the deed there was no law in force authorizing

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such deed to be made upon proper survey and plat and certificate thereof and assignment to Wyatt having first been made and returned?

*Fourth.* Whether under and by the provisions of section 40, of the 31st chapter of the Code of this State, aforesaid, the deed was made valid and effective so as to pass the title of the owners in whose names it was returned delinquent and sold?

*Fifth.* Whether, under all the circumstances appearing, it was error in the court below, by its decree rendered on the 16th day of April, 1869, to decree partition of the land in the bill mentioned, and deny to Wyatt and Kelly, or either of them, any right therein?

Among the greatest of civil evils from which the people of what is now the State of West Virginia have suffered has been the confusion of land titles hereinbefore referred to, and the judiciary should certainly give reasonable, just and firm support in its judgments and decrees to proper efforts of the Legislature to mitigate and remove the calamity, and to avoid its further increase or aggravation. The State governments of the Union derive their support chiefly from direct taxation upon property; and it is difficult to see how their existence can be continued without the collection of the taxes imposed by law or levied by proper authority in pursuance of law. It has always been deemed just and expedient in Virginia, West Virginia, and, I believe, all the other States of the Union, to charge and collect, by law, taxes upon and from lands. To realize the taxes imposed or charged by law, it was found to be indispensable to declare the taxes charged upon land a lien thereon for the payment thereof, and in case of a failure to pay the taxes, to provide, by law, for the collection or realization thereof by sale of the land, or sufficient thereof, for the purpose, and ultimately to pass the title of the owner in default, to the purchaser, by deed, unless the land sold was re-deemed according to law.

It cannot be maintained that the purchaser by the purchase, payment of the purchase money, and delivery to him of the sheriff's receipt for the purchase money in due form, became invested with the legal title which was vested in the owner in whose name it was returned delinquent. What right or interest then did the purchaser acquire in the land sold to him? The answer is apparent and clear. He immediately acquired the right, if the land was not redeemed in the manner prescribed by the 13th section of chapter 37, of the said Code of Virginia within two years from the sale, to obtain a deed in the mode and manner prescribed by the 15th and 17th sections of said chapter 37, without privilege to the former owner to redeem, until after the expiration of one year from the expiration of the two years without the deed having been made to the purchaser, in which case, after the expiration of the year, without the deed having been made, he had the right to obtain the deed at any time before the land was redeemed; and the deed when properly obtained and properly made and recorded within the proper county, within six months from its date, vested him, under the 23d section of chapter 37, aforesaid, with the estate in the land sold as it was vested in the parties assessed with the taxes (on account whereof the sale was made) at the commencement of the year for which the said taxes were assessed, notwithstanding any irregularity in the proceedings under which he (the grantee) claims title, unless such irregularity appear on the face of the proceedings. This right grew directly out of the contract of sale and purchase made in pursuance of law.

The contract was a civil contract to all intents and purposes, and this right, I think, may properly be designated as an equitable right or interest in the land sold, entitled, on the failure to redeem, to ripen into a full legal title, as before stated. In the case of *Morrison v. Campbell*, 2 Rand., 206, it was held that "An inchoate right to land, held by entry and survey only, is

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real estate, and will descend to the heirs and not to the executors." The 21st section of said chapter 37 treats the right or interest of the purchaser as real estate; as it provides that if the purchaser shall have died, the deed shall be made to his heirs or assigns. This right or interest of the purchaser in the land is given by the law expressly such attributes of property that it may pass by written assignment, or by descent. This disposes of the first question.

The two years from the day of sale expired on the 17th of September, 1862. The third year from the day of sale had not expired when the Constitution of this State, of 1863, went into operation by about one-third. The land was not redeemed within the two years, and at the time said Constitution went into operation the purchaser was entitled to proceed at once and have a deed, without any existing right or privilege of redemption in the former owner, or any other person. It is therefore clear that at the adoption of the Constitution of this State, of 1863, Kelly had an equitable right or interest in and to the one hundred and ten acres of the land, sold to him as aforesaid, being part of the land in the bill mentioned, and that, by virtue of such equitable right or interest, Kelly had the right to proceed for and obtain, a deed for the same, in the mode and manner prescribed by said fifteenth and seventeenth sections of said chapter thirty-seven; and that such equitable right and interest was derived under the laws of Virginia prior to the time the Constitution of this State, of 1863, went into operation; and that such equitable right or interest is within the meaning and purview of the first section of article nine of said Constitution and was thereby secured.

I now proceed to consider the third question. A State cannot avoid selling lands, in some manner, for the non-payment of taxes lawfully charged thereon. When such sales are made, substantially in conformity to law, the purchaser should be reasonably secured and protected in his purchase. Public policy obviously re-

quires this, and the true interest of the former owner demands it; for if it is held and generally known that such sales are valid and binding it is not easy to see why lands sold at such sales should command a less price than if sold at public sale for any debt under decree of a court of equity. But if such sales are treated as mere matters of form, and to be avoided at the option of the owners for whose default the sales became necessary, or for slight and immaterial or unsubstantial reasons, it cannot be reasonably expected that the lands sold will command more than a mere nominal price. In such cases a whole tract of a thousand acres would not command more than sufficient to satisfy the small amount of tax due, when otherwise one acre thereof, or perhaps less, would be amply sufficient for the purpose, and the entire residue be saved to the owner. See upon this subject the opinion of judge Allen in the case of *Flanagan v. Grimmer*. In making the sale the sheriff must be deemed to have acted as the agent of the State and of the owners, and the substantial parts of sections fifteen, sixteen, seventeen, twenty-two and twenty-three of said chapter thirty-seven, except so far as they apply to the specific remedy, it seems to me, must be considered as constituting material and substantial parts of the contract of sale and purchase; and that the contract being a civil contract it should receive such reasonable construction and be given such force, as to the material and substantial parts thereof, as are ordinarily given to the other lawful contracts of a civil nature. If this is done then tax sales, in so far as they amount to civil contracts, are as much protected in their obligation against being impaired by State legislation by the Constitution of the United States and of this State, as other civil contracts. The repeal of the said thirty-seventh section of the Code of Virginia, and the act of 1862 cannot be construed, consistently with the Constitution of the United States and of this State, as having destroyed the contract and its obligation, or the equitable right or in-

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terest of the purchaser in the land by virtue of the contract. But it is maintained in argument that although the repeal of said chapter thirty-seven and the act of 1862 by the act of 1866 may not have destroyed or impaired the obligation of the contract, or extinguished the equitable right or interest of the purchaser in the land, that it took away the remedy or means theretofore provided by law, and then in existence, by which the purchaser could obtain a deed or invest himself with the legal title to such estate in the lands as he contracted for; that although the act of 1866 does not expressly repeal the said act of 1863, still it does so by implication, and that the act of 1866 does not provide a remedy for the purchaser; that if the act of 1863 cannot be held as being repealed, expressly or by implication, yet the repeal of said chapter thirty-seven and the act of 1862 rendered the act of 1863 inoperative, practically, and the purchaser was thereby left without remedy.

It seems to me from the provisions of the acts of 1866 that the Legislature simply meant by the repealing clause that that act would take the place of the said thirty-seventh chapter of the Code, and of the act of 1862, as a general law governing future sales for taxes, and providing how deeds should or might be obtained by purchasers at the tax sales of 1865; that in fact the Legislature did not intend to repeal the act of 1863, or render it practically inoperative as to sales made in 1860. If they did so intend, why did they not say so in the act of 1866? Why expressly name the act of 1862 in the repealing clause, and not the act of 1865, or the eleventh section of the act of 1868? The act of 1863 was of much more importance and of more prominence than the act of 1862, as may readily be seen by a comparison of the two; that while the Legislature did not intend that the said thirty-seventh section of the Code, and the act of 1862 should remain or continue longer in force as general laws, still the Legislature did not intend by the repeal to destroy or impair the obli-

gation of the contracts of sale made for taxes in 1860, or to destroy the equitable rights or interests of the purchasers at such sales, or to leave such purchasers without any remedy by which they could obtain the title thereto which was certainly their just and constitutional right; that it was in the legislative mind that parts of the said thirty-seventh chapter of the Code were material and substantial parts of the contracts of sale made thereunder, and that, although by virtue of the repealing clause, the chapter was repealed as a general law in the future as applicable to future sales, and the mode of obtaining deeds for lands sold in 1865: that still so far as any section or sections of the chapter constituted a substantial part of the contract of sale of land made in 1860, that they must be considered as remaining in force as part of the contracts in these cases; and that such construction being proper and in accordance with the Constitution of the United States, and of this State, the act of 1863, would continue to provide a remedy for such purchasers as ample, as before the passage of the act of 1866. It is not the province of the courts to so construe an act of the Legislature as to make it so operate as to deprive those who have just legal or equitable rights of all remedy for their enforcement or for redress, if any other reasonable construction can be placed upon it.

It has often been held, and as I conceive with justice and wisdom, that a law which deprives a party of all legal remedy, must necessarily be void.

Several statements, *in pari materia*, and relating to the same subject, are to be taken together and compared, in the construction of them, because they are considered as having one object in view, and as acting on one system. And the rule applies, though some of the statutes may have expired, or are not referred to in the other acts. The object of the rule is to ascertain, and carry into effect the intention of the Legislature; and it is to be inferred that a code of statutes relating to one subject was

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governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. 1 Kent Com. 463. Statutes are not considered to be repealed by implication, unless the repugnancy between the new provisions and a former statute be plain and unavoidable. *Id.*, 466, note C and cases cited. A construction which repeals former statutes or laws by implication, and divests long approved remedies, is not to be favored in any case. *Id.* citing Cowen Judge, 3 Hill (N. Y.) 472. Virtual repeals of statutes are not favored by the courts. *Taylor v. Shields' Heirs* 5 Litt. (Ky.) 295. See also 1 Kent. Com. 455. *Dash v. Van Kleeck* 7 Johns. (N. Y.) 477. *Whitman v. Hapgood* 10 Mass. 437; *Hassler's Lessees v. King* 9 Gratt. 123 and 124:

Under the provisions of the fifteenth section of said chapter thirty-seven taken in connection with the act of 1863, the purchaser had nothing to do but to have the quantity purchased laid off at his expense, by the surveyor of the county, the survey to commence on either of the lines of the tract at the option of the purchaser, so as to include the improvements on the same (if it could be) and in one body, the length whereof not more than double the breadth, where practicable, and have a plat and certificate of the survey returned to the circuit court of the county or judge thereof in vacation and ask the court or judge to order it to be recorded, and if they were correct (I mean the plat and certificate) the court or judge was bound to make the order, and then it became the duty of the Recorder of the county to make to the purchaser a proper deed, on request. The duty to be performed by the circuit court or judge, in such case, is simply ministerial, and not judicial. The court or judge has no authority to inquire into the regularity or validity of the sale made by the sheriff. *Randolph Justices v. Stalnaker* 13 Gratt. 523; *Delany v. Goddin* 12 Gratt. 266.

The making of the survey of the land, purchased in the manner substantially specified in the fifteenth section

of said chapter thirty-seven, by the purchaser, it seems to me is a material part of the contract to be performed by him, *before* the deed can be lawfully and properly made for the land purchased, though it may be called part of the proceedings to be had upon the deed. It is also material that the deed shall refer to the plat and certificate of survey. See *Randolph Justices v. Stalnaker* before cited. It cannot be maintained that the deeds, properly made, according to said thirty-seventh chapter of the Code and of the act of 1860 and the act of 1863, to purchasers of lands sold at the tax sales of 1860, prior to, and even the day before, the passage of the act of 1866, or the rights of the grantees, are, or can be, affected, in the least, by the repeal of the laws under which the sales or deeds were made.

"The *obligation of a contract*," it is said "consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them, by one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect or diminish the duty, or impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence any law which, in its operations, amounts to a denial or obstruction of the rights, accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution. It is the civil obligation of contracts which the Constitution is designed to reach; that is the obligation which is recognized by, and results from, the law

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of the State in which it is made." Cooley's Con. Lim. 285 and 286 and cases there cited. When a contract is neither illegal or void its obligatory force is coextensive with its stipulations. *Id.* 206. Story on the Con. sec. 1380. "Such being the obligation of a contract, it is obvious that the rights of the parties in respect to it are liable to be affected, in many ways, by changes in the laws, which it could not have been the intention of the constitutional provision to preclude." "But the changes in the laws are not regarded as necessarily affecting the obligation of contracts. Whatever belongs merely to the remedy may be altered according to the will of the State, *provided* the alteration does not impair the obligation of the contract; and it does not impair it, *provided* it leaves the parties a substantial remedy, according to the course of justice, as it existed at the time the contract was made. It has accordingly been held that laws changing remedies for the enforcement of contracts will be valid, notwithstanding the new remedy is less convenient than the old or less prompt and speedy. Cooley's Con. Lim. 286 and 287, and cases there cited. "The State is bound to afford adequate process for the enforcement of rights; but it has not tied its own hands as to the modes by which it will administer justice. These, from necessity, belong to the supreme power to prescribe; and their continuance is not the subject of contract between private parties." *Id.* 289. "But a law which deprives a party of all legal remedy must necessarily be void. If the Legislature of the State were to undertake to make a law preventing the legal remedy upon a contract fully made, and binding on the party to it, there is no question that such Legislature would exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract within the meaning of the Constitution. And a law which takes from certain classes of persons the right to maintain suits, because of having participated in rebellion against the government, is void, on the same ground. And where

a statute does not leave a party a substantial remedy, according to the course of justice, as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper or embarrass the proceedings to enforce the remedy, so as to destroy it entirely, and thus impair the contract so far as it is in the power of the Legislature to do it, such statute cannot be regarded as a regulation of the remedy, and is void." *Id.*, 289, 290; and authorities there cited. "So a law which extends the time for redemption of lands sold on execution, or for delinquent taxes, after the sales have been made, is void; for in such a case the contract with the purchaser, and for which he has paid his money, is that he shall have title at the time then provided by law; and to extend the time for redemption is to alter the substance of the contract, as much as would be the extension of the time for the payment of a promissory note. And where by statute a purchaser of lands from the State had the right, upon the forfeiture of his contract of purchase, for the non-payment of the sum due upon the contract, with a penalty of five per cent., *it was held* that this right could not be taken away by a subsequent change in the law which subjected the forfeited lands to private entry and sale. *And it has been held* that a statute repealing a former statute, which made the stockholders in a corporation liable for its debts, was in respect to creditors existing at the time of the repeal, a law impairing the obligation of contracts. In each of these cases it is evident that substantial rights were affected; and when the laws which were held void operated upon the remedy, they either had an effect equivalent to importing some new stipulation into the contract, or they failed to leave the party a substantial remedy such as was assured to him by the law in force when the contract was made. *Id.* 291; 292, 293, and cases there cited.

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After much reflection, as well as examination, it is the conviction of my mind, that the act of 1866 did not re-



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peal, expressly or impliedly, the act of 1863, or render it practically inoperative as to purchasers of land at the tax sales of 1860. But suppose that such was the plain and clear effect of the act of 1866. Can or should it be held that the purchasers at these sales who were, at the passage of the act of 1866, and before, justly and lawfully entitled to obtain deeds for the lands purchased, were thereby left, or intended to be left, by the Legislature, without remedy?

Courts will not readily intend, where the Legislature enacts a general law upon a given subject and repeals an existing, general law, of like character upon the same subject, that it was the intention of the Legislature, by the repeal, to deprive parties who acquired just rights or interests under the old law, of all remedy, or to extinguish their rights or interests, unless such intention is manifest. But courts may properly, in such cases, rather than the parties should be left without remedy, intend that the proceedings or remedy provided by the new law, as far as practicable, was intended by the Legislature to be applied to rights and interests acquired under the old law. *Wright v. Oakley*, 5 Metc. (Mass.) 406; *Steamship Co. v. Jolliffe*, 2 Wall. (Sup. Ct. U. S.) 458; *Hassler's Lessee v. King*, 9 Gratt. 115.

The eighteenth section, of chapter sixteen, of the Code of Virginia, to which I have already referred, provides, in substance, that no new law shall be construed to repeal a former law, as to any right accrued, or claim arising, under the former laws or in any way to affect any such right accrued or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings.

This section was in full force and effect at the passage of the act of 1866, and it certainly was neither expressly or impliedly repealed by that act, and clearly was not intended to be. It must be presumed that the Legislature knew of this section, and

contemplated its effect and operation. With this section continuing in force, would it not have been practicable and proper for the purchaser to have proceeded and obtained a proper deed under sections fourteen and sixteen, of the act of 1866? Said sections fourteen and sixteen are exact copies of sections fifteen and seventeen of chapter thirty-seven of the Code of Virginia, except as to the tribunal and officer who are to act upon the plat and certificate of survey and make the deed. The right existing, and being secured, if there be no other remedy, what reasonable or just objection, I again ask, could there have been to the purchaser, or his heirs, or assigns, (where the assignment has been properly made) proceeding to obtain, and obtaining, the deed under sections fourteen and sixteen of the act of 1866, conforming the proceedings to the provisions of these sections? I confess that I am at present unable to see any just or well founded objection to such a proceeding, and think it would, under the circumstances, have been proper and competent. For the foregoing reasons, according to my present judgment and conviction, the deed to Wyatt and Kelly was, and is, not void and of no effect, when executed, or on the day of its date and prior to the first day of April, 1869, when chapter thirty-one of the Code of this State took effect; because at the date of the deed there was no law in force authorizing it upon proper survey and plat and certificate and assignment to Wyatt; and I am of opinion that it would have been competent for the purchaser (Kelly) to have procured such survey and plat and certificate of survey to be made at, and prior to, the execution of the deed, and also for him to have made the assignment to Wyatt. But while this is true, I am clearly of opinion that the deed was, and is not, good or sufficient to pass title, because there was no such survey and plat and certificate of survey made and returned prior to the execution of the deed, and because no reference is made to such plat and certificate of survey in the deed as having been

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made. *Randolph Justices v. Stalnaker*, 526, opinion of Allen, Judge. The deed is probably subject, upon its face, to other just criticisms and objections, but I deem it unnecessary now to consider them. The court had no duty or authority imposed or conferred upon it, except to pursue the statute. It had no authority to order the deed to be made to any person, and the making of such order by the court could not give validity and force to the deed if otherwise insufficient. In the case of *Charles Shutte v. Uriah Thompson*, 15 Wall., 151, recently decided by the Supreme Court of the United States, it seems that the validity of a deed made after the passage of the Act of 1866, to a purchaser at a tax sale in the county of Doddridge, in the year 1860, was passed upon by that Court. And the Court, in its opinion, uses this language, viz: "The next error of which complaint is made is, that the court refused to permit the defendant to give in evidence a tax deed for the lands from Talliaferro Knight, Recorder of Doddridge county, to John S. Hoffman. It seems to have been offered to show title out of the plaintiff. The deed bears date the 26th of March, 1866. From the recitals contained in it, we are informed that the land was returned delinquent for the non-payment of taxes for the year, 1857, and that it was sold in the year 1860, to John S. Hoffman. The sale was made under the laws of Virginia, of which West Virginia was then a part. (Chapter thirty-seven, Civil Code). By that statute, two years were allowed for redemption, and after they had expired the purchaser was required to have a survey made and reported to the court of the proper county, which, if approved, the court might order to be recorded. After all this had been done the clerk was required to make a deed to the purchaser in conformity to the survey. No sale could be consummated, and no deed could be made prior to the return, confirmation and record of such survey. It is important to keep these provisions of the law in mind; for in 1863, West Virginia became a

separate State. By virtue of a clause in its Constitution, as well as without such ordinance, the laws of Virginia continued in force until changed by the West Virginia Legislature. But that Legislature, on the 27th of February, 1866, passed an act by which the entire thirty-seventh chapter of the Virginia Code was repealed, so far as it applied to tax sales of land in West Virginia. Acts of the Legislature, 1866, p. 85. At that time the deed to Hoffman had not been made, nor had the survey of the land been made and reported. This appears from the deed itself. It is plain, therefore, that there was no authority for the survey and report, or for the deed. Without the statute in existence when they were made, they could have no efficacy. As transmissions of title they were wholly void. The deed was, therefore, properly rejected." This is all that is said upon the question in that opinion. It would seem that the court entirely overlooked the statute of 1863, the first section of the ninth article of the Constitution of this State, and the question as to whether the purchase was a civil contract, and whether the purchaser, by the purchase, became vested with an equitable right or interest in the land purchased, and whether such right or interest by the first section of article nine of the State Constitution secured that equitable right or interest to the purchaser. The court also seems to have considered, from the language employed, that the court might or might not confirm the plat and certificate of survey; that the act was a judicial act. According to the decisions of the Court of Appeals of Virginia, made prior to the formation of the State of West Virginia, and before the war, the duty of the court was merely ministerial, and not judicial. In the case of *Randolph Justices v. Stalnaker*, 13 Gratt., 523, the court unanimously held "that it is the duty of a county court, acting under the Code, chapter thirty-seven section fifteen, page two hundred and ninety-three, in relation to land sold for taxes, to admit the report of the

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surveyor, and to record it if it conforms to the act. And the court has no authority to inquire into the regularity or validity of the sale made by the sheriff." And also that the circuit court may proceed by *mandamus* to compel the county court to admit the report of the surveyor to record." See also *Delany v. Goddin*, 12 Gratt 266. The Supreme Court of the United States does not refer to or seem to have considered the fortieth section of chapter thirty-one of the Code of West Virginia hereinbefore cited, as to what effect it gives to such tax deeds—whether it makes them valid or not. In a word, that court does not seem to have considered scarcely any of the questions I have discussed, touching the effect of the passage of the act of 1866, and the repealing clause thereof. Whether it was because the questions were not brought to its attention, or for some other reason, I am left to conjecture. But I have great respect for the decisions of the Supreme Court of the United States upon all questions brought before it; and if I could see or feel satisfied that that Court had fully considered the questions I have discussed, and decided them adverse to my views, as herein expressed, I should feel strongly inclined, if my conscience would permit me, to follow and adopt its decision. It would be strange indeed, if, under the circumstances, the repealing clause of the act of 1866 could properly be construed to deprive the purchaser of the right or authority to have the survey made according to the contract, when that right was a part of the contract, and when the purchaser was not in default. The purchaser had not been required by any law to have the survey made, returned and recorded, or the deed made within any fixed period, and the act containing the repealing clause gave him no time whatever in which to do so, and the repealing act took effect from its passage. I repeat that it cannot be maintained that the purchaser was in default, or had done or failed to do any act by which his right or interest had been forfeited. If such construction is legitimate and proper,

then the purchaser at a tax sale who pays his money in good faith is left without adequate security or protection. It would be equivalent to deciding that while the Legislature cannot pass a law impairing the obligation of a civil contract, still it is competent for the Legislature to at once directly destroy the contract, purposely or by accident or mistake, by depriving a party of the power or authority of performing it. This would certainly be most startling, looking alone to the Constitution of the United States; and still more so, in the face of the first section of the ninth article of the Constitution of this State, of 1863, and other provisions thereof. The general policy of the Legislature of Virginia and of this State, since its formation, from 1809 to 1871, inclusive, as indicated by the legislation, has been to inspire in the public mind faith in the efficacy, validity and binding effect of sales made of lands for taxes. That policy was adopted with the purpose of inducing and compelling the owners of land within the State to pay the taxes charged thereon, and in case of failure to pay, to prevent a sale of the land at an undue or ruinous sacrifice to the owners and to settle titles to lands. 2 R. C., 1819, App. 4, ch. 17, sec. 8, p. 532; ch. 24, sec. 38, p. 551; Acts 1831-2, ch. 72, sec. 22, p. 65; Acts 1866, ch. 90, sec. 21, p. 89; Code of West Va., 1868, ch. 31, secs. 25, 26, 27, 29, 40, 41; Acts 1871, ch. 194, p. 247. See also the very able opinion of the court delivered by Allen, judge, in the case of *Flanagan v. Grimmett*, 10 Gratt. 421, and also the cases before cited in 12 and 13 Gratt. It seems to me that to established the construction which may be drawn from the decision of the Supreme Court of the United States and contended for by the appellees here, to which I have referred, would at once and forever defeat the general policy of the legislation to which I have alluded.

It is true the purchaser here paid but a small sum of money, as the price, but he purchased, according to the

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allegations of the bill, less than one-third of the land and the principles involved in the case are the same as if the purchaser had paid thousands of dollars.

It is proper that I should say that the only question presented to the Supreme Court of the United States for decision in the case of *Thompson and Shutte* was whether the legal title passed by the tax deed, but the decision of that question involved some other questions, though not all I have considered.

Does the second clause of the fortieth section of chapter thirty-one of the Code of the State make the deed to Wyatt and Kelly valid, notwithstanding its invalidity at the time the Code took effect? The fourth clause of the section must be read in connection with the second, and reading these clauses together, I think it is clear that it was not intended by the Legislature that a tax deed of the character of the one under consideration should not be declared invalid and insufficient to transmit title by the court in a proper case for the substantial deficiency which I have ascertained, especially if such action be taken by the court within twelve months after the passage of the Code. The court in this case declared the deed invalid, within twelve months after the passage of the Code, and the case was pending before and after the adoption of Code. The legislature is not inhibited by either of the Constitutions of this State from passing "retrospective" laws, and it was, and is, competent for the Legislature to pass such laws in many cases, if they are not *ex post facto*, and do not impair the obligation of contracts. The power and authority of the Legislature to pass "retrospective" laws of a healing or curative character, subject to the restrictions aforesaid, is very considerable. See this subject quite fully discussed and authorities cited, in Cooley's Con. Lim., 371, 372, 373, 374, 375, 376, 377, 378, 379. There may be some question whether the fortieth section, in and of itself, could be construed to validate the deed in this case at any time; but as the question does not arise I will not now

determine it. I do not think the deed was made good and valid by the said fortieth section.

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But while I do not think the deed was valid to pass title, still the equitable title or interest in the land, subject to the right of redemption, had not been extinguished, but was in existence at the adoption of the Code of 1868, and when it took effect; and it was competent for the Legislature, even though the act of 1866 could properly be construed as leaving Kelly and Wyatt without remedy, to provide a remedy by which they could obtain a good deed for the one hundred and ten acres. Cooley's Con. Lim., pages last cited. And the thirty-first chapter of the Code of 1868 does provide a remedy in the fortieth and other sections thereof: but the last clause of the twenty-fourth section of that chapter provides, in effect, that no deed shall be made where the sale occurred more than five years prior to the passage of the Code, unless made within two years from such passage. The two years had not expired at the date of the decree, and in fact only a small part of it. At the date of the decree, therefore, Wyatt and Kelly had an equitable right to one hundred and ten acres of the land, and the right to proceed, at once, to obtain a deed therefor, according to the provisions of the Code; but the owners, their heirs or assigns, had at the same time the right to redeem at any time before the deed was made. And it was error in the court, as the case now appears, to make the decree of partition of the land at the date of the decree, unless prior to the making of the decree the land had been redeemed, in the manner prescribed by law, which does not appear to have been done. If Wyatt and Kelly do not show that they properly procured a proper and sufficient deed for the one hundred and ten acres within two years from the 29th day of December, 1868, the date of the passage of the Code, then it must be considered, and held, that their equitable right or interest had been extinguished. I think it entirely competent for the Legislature, in such cases, by subsequent law, to fix a time within which



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purchasers at tax sales shall obtain their deeds. Public policy evidently requires that such authority should exist, and I don't see that a proper exercise of it violates any constitutional inhibition. If Wyatt and Kelly establish, properly, that such deed as I have indicated, for one hundred and ten acres, was made to them within the two years last stated, and has been recorded according to law, then they are entitled to the one hundred and ten acres of land conveyed by such deed, unless sufficient cause be shown to the contrary. It is evident that the whole record of the case has not been brought before this Court. The parties seem to have considered that there was no other question in the case but that involved by the tax claim. The court in its decree determines that the land in the bill mentioned is owned as follows, to-wit: five-ninths of one moiety by John McConihay, and four-ninths by the heirs of Shrewsbury and Dickinson, one-half of the other moiety by the assigns of William and Andrew F. Donnally, and one-half of the other moiety by the heirs of William Forqueran and directs partition accordingly. This description of the owners and the parties among whom partition shall be made is not sufficiently specific. The court in directing partition of lands, should, ordinarily, ascertain in the decree the names of the owner or persons, to whom any part is to be assigned, where they are not unknown. There is nothing in the record here showing who are the heirs of Shrewsbury or Dickinson, or who are the assignees of William and Andrew F. Donnally. "The petition of John McConihay and the heirs of Joel Shrewsbury and the heirs of William Dickinson," mentioned in the decree, is not copied into the record, and as the record stands, I cannot ascertain whether the proper parties are before the court, in a proper manner, or among what parties partition should be made of the land in the bill mentioned, should Wyatt and Kelly be excluded, or denied any right. Under the circumstances and as the decree must be reversed for the error in rela-

tion to Wyatt and Kelly, it is perhaps not necessary that any other questions should now be determined, especially, when no question is made by counsel and no investigation or determination, of any other questions are desired at this time by any of the parties or their counsel.

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For the foregoing reasons the decree of the circuit court of the county of Kanawha rendered in this cause on the 16th day of April 1869 must be reversed and annulled and the appellants recover against the appellee their costs about the prosecution of their appeal in this Court expended. And this Court proceeding to make such decree as the court below should have made the cause must be remanded to the circuit court of the county of Kanawha for further proceedings therein to be had, according to the principles determined in this opinion and the rules governing courts of equity in such cases; and leave is given the plaintiff to file a replication to the answer of the defendants Wyatt and Kelly, and to file an amended bill making additional parties, if he shall ask so to do, and with leave to the defendants Wyatt and Kelly, to file a supplemental answer if they shall ask permission so to do.

PAUL and MOORE, Judges, concurred.

HOFFMAN, Judge, expressed no opinion in consequence of certain references to him in the foregoing opinion.

DECREE REVERSED AND SUIT REMANDED.

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- I. When the court erroneously makes an order that unless a person who is not a party to the bill, is so made, within thirty days from the date of the order, by amended bill, that the plaintiff's bill should stand dismissed, with costs to the defendants, without prejudice to any other suit, &c., and the plaintiffs failed to make such party a defendant by amended bill, or otherwise, within the thirty days or afterwards. And the defendants afterwards, and after the thirty days had expired and before any other action was taken in the cause by the court, or any of the parties appeared in court and asked and obtained leave of the court, without objection, to file a cross bill in the cause, against the plaintiffs in the original bill, and, in pursuance of such leave, did file such cross bill, to which the defendants filed their answers and plaintiffs and defendants afterwards took and filed the depositions of various witnesses in support of their pretensions in the original cause, and various orders and decrees were afterwards made by the court in the proceedings, on both the original and cross bills, including the decree adjudicating the principles of both causes from which the appeal is taken as though said order of conditional dismissal had never been made, without objection being made or taken, by the court or any of the parties to the cause, proceeding further in the cause, at any time, after the expiration of the said thirty days: It is too late for the appellants, who were defendants below, to be heard in the appellate court, to object that the original cause at and after the expiration of the thirty days from the date of said order of conditional dismissal become, and was, dismissed by virtue of such order, and that all subsequent proceedings of the court in the causes, were, in consequence thereof, irregular and inoperative or void. In such case the appellate court will ordinarily consider that the causes were proceeded with by the court by consent of parties.

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| 7  | 152 |
| 34 | 338 |
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| 41 | 507 |
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| 49 | 447 |
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| 52 | 322 |
| 7  | 152 |
| 60 | 288 |
| 7  | 152 |
| 61 | 546 |
| 7  | 152 |
| 62 | 219 |

- II. If, in the case above stated, the person so directed to be made a party to the original cause, was a necessary and proper party thereto, under the circumstances above stated, the appellate court will not reverse and set aside the decree of the court below adjudicating the principles of the cause, because of such conditional order of dismissal and give full effect thereto; but in such case the appellate court will ordinarily reverse the decree appealed from, and direct such person to be made a party, and the cause to be proceeded with, as though such conditional order of dismissal had never been made. 1874.  
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- III. A copy of an order of the county court of Alleghany county, Commonwealth of Virginia, attested by the clerk of such court, may be received and read as evidence in lieu of the original, by the courts of this State, under the provisions of the act of the Legislature of 1866, upon that subject, which is incorporated into the Code of this State, of 1868, in sections five, six and seven of chapter one hundred and thirty.
- IV. A copy of such order, so attested, is proper evidence of the appointment, by the county court of said Alleghany county, of a committee of an insane person.
- V. When a demurrer is filed to a bill and the court proceeds to adjudicate, and does adjudicate, the principles of the cause, in favor of the plaintiff, without first acting *pro forma* upon the demurrer, it will be considered that the court in rendering the decree adjudicating the principles of the cause considered the sufficiency of the bill, and substantially overruled the demurrer thereto, and this Court will not reverse the decree, adjudicating the principles of the cause, for this cause alone.
- VI. L. by contract in writing, under seal executed by him, and J. and H. sells to J. and H. several tracts of land for a stipulated price to be paid by J. and H. to L. at stated times; and under and by virtue of the contract of sale. J. and H. are put in actual possession of the lands by L. and J. and H. in pursuance of such contract, pay a large amount of the purchase money, but not all of it, and it is applied in discharge of purchase money liens existing against part of the land. Afterwards, and while J. and H. are in possession of the land under such contract, and before all the purchase money is paid by J. and H., L. P. H. is appointed committee of L., who is then insane, by the county court. After his appointment as committee, L. P. H. filed a bill in the circuit court of the county where the land was situated against J. and H. and others, to rescind and annul said contract of sale, upon the ground that L., at the time of its execution, was insane. Afterwards, and while the suit was pending, L. P. H., committee, and J. and H. executed

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a paper writing in these words, to-wit: "This article of agreement, made and entered into this the 29th day of March, 1861, between Lewis P. Holloway, committee of D. B. Layne, of the one part and William Hinchman, Jr., and Thomas Johnson, of the other part, witnesseth: That the said Lewis P. Holloway pledges himself to come to the house of the said Thomas Johnson on the 18th day of April, 1861, for the purpose of consummating a compromise in a suit in chancery, instituted in the circuit court of Monroe county, in which said Holloway is plaintiff and the said Hinchman and Johnson are defendants, upon the following terms here agreed upon, to-wit: That the said Lewis P. Holloway binds himself to pay to said Johnson and Hinchman the amount of money they have paid John Echols for land bought of D. B. Layne, with interest from the time of said payment until all is refunded by said Holloway; and said Holloway is to return them, the said Hinchman and Johnson's bonds given to said Layne for purchase money of said land; and the said Holloway is to pay said Johnson and Hinchman's lawyer's fee, amounting to \$200, and is to dismiss the said suit upon the terms, to-wit: that each party is to pay his own costs in said suit. The said Johnson and Hinchman are to pay to the said Holloway rent for the said land during the time they occupied it, and the said Johnson and Hinchman are to have possession of said land until Christmas, and have the privilege of moving their grain, &c., and are to pay said Holloway for the corn and oats they sow and raise this season, the usual grain rent; and the said Holloway is to pay the said Johnson and Hinchman for the improvements they have made upon said land, and if they cannot agree as to the value of said improvements, they are to choose disinterested persons to value the same. The said Holloway is to take for the rent of the islands rented by the said Hinchman and Johnson the usual grain rent or the rent that Johnson and Hinchman are to get for same. Witness the following signatures and seals:

(Signed.) LEWIS P. HOLLOWAY, COM., (Seal.)

THOMAS JOHNSON, (Seal.)

WILLIAM HINCHMAN, JR., (Seal.)

L. P. H. died after the date of this agreement without ever having done any act towards consummating the same. L. also died insane. J. and H. continued in the possession of the lands as before. J. and H. never saw L. P. H. after the date of said agreement. After the death of L. P. H. and L., and in October, 1866, J. and H., still in the possession of said lands and without having actually performed any part of said agreement, filed their bill, in the circuit court of the county of Monroe, in this State, where the lands are situated, against the personal representative and legal heirs of L., &c., for the specific execution of said agreement of compromise; and the bill does not allege that L. was insane at the date of the contract by him to plaintiffs—HELD:

1. That as the said agreement of compromise, if it were complete and final and carried into effect, would change the nature and condition of the estate of L. (the insane person), L. H. P., as committee had no authority to make the same, so as to bind the personal representative and legal heirs of L. without the approbation or direction of the court by which he was appointed committee, or of some other court having jurisdiction of the subject. 1874.  
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2. That as the said agreement of compromise was made by the committee without the approval or direction of the court by which he was appointed, or of any court having jurisdiction of the subject, a court of equity will not decree a specific execution thereof, as against the personal representatives and legal heirs of L., unless it appears to the satisfaction of the court that the agreement was beneficial and advantageous to L. or his estate.
3. Although a committee of an insane person may sue to set aside a deed or contract of the insane person, touching his estate, made prior to the time he was appointed committee, upon the ground that such insane person was insane at the time of making such deed or contract of sale: Still if the committee does bring such suit, and, while the suit is pending, he makes an agreement of compromise with the defendant, which, if carried into effect, will change the nature and condition of the estate of the insane person, without the direction or approval of the court having jurisdiction of the subject, a court of equity will not in another suit, decree specific performance of such agreement of compromise against the personal representatives and legal heirs of the insane person, unless it appears that the insane person was insane at the time of the making of the deed or contract, and that the agreement of compromise was beneficial and not injurious to the insane person or his estate.
4. Generally, the conduct and acts of a committee of an insane person, in relation to the estate of such insane person, are subject to the direction, approval or disapproval of the court having jurisdiction of the subject.
5. That the fact that the committee of an insane person is authorized by law to sue and be sued, touching the estate of such insane person, does not, in and of itself, authorize the committee to compromise a suit brought by him, so as to change the nature and condition of the estate of the insane person.
6. It appearing in this case, that L. at the time he made the contract of sale of the lands was sufficiently sane to make the contract, and that the contract was beneficial to his interests, and

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it not appearing that the contract of sale is invalid, for any cause, or that the agreement of compromise was beneficial to the interest of L., (the insane person), *for these reasons alone*, a court of equity ought to refuse to decree specific execution of the agreement of compromise, (if it were complete and final on its face), against the personal representative and legal heirs of L.

7. The said agreement of compromise, if it were not otherwise objectionable, is not such a final, completed contract, as a court of equity will enforce, by decree of specific performance.
8. It appearing that L. had purchased from T. the larger part of the land sold by him to J. and H. (the plaintiffs in the original bill), and that, at the time of the sale from L. to J. and H. and afterwards, there was a large amount of purchase money due from L. to T., on the land so purchased by L. from T., and that T. had never conveyed the same to L., and that T. was dead, and at his death his purchase money was unpaid, and it not appearing that the legal heirs of T. ever conveyed the land, it was error in the court below to decree the sale of the land, so sold by T. to L. without the personal representative and legal heirs of T. being made parties to the cause and regularly brought before the court by proper process.
9. It was not error in the court below to allow the personal representative and heirs of L. to file a cross-bill, in the original cause of J. and H. aforesaid, asking the court to confirm the original contract of L. with J. and H. for the sale of the land, and to sell the land to pay the unpaid purchase money, due the estate of L. deceased; but the personal representative and legal heirs of said T. deceased, as well as all other parties in interest, should be made parties thereto.

An appeal from a decree of the circuit court of Monroe county, by the respondents in a suit in chancery pending in said court, wherein John Hinchman, in his own right and as administrator of William Hinchman, Jr., deceased, Andrew Hinchman, Mary Hinchman, Thomas Johnson and Minerva, his wife, Andrew A. Miller, James Miller, Elizabeth B. Miller, George Miller, Samuel W. Beard, and Sarah, his wife, George W. Poage and Cornelia A., his wife, William B. Johnson and Agnes, his wife, and T. A. George and Mary S., his wife, were complainants, and Lewis Ballard, sheriff of said Monroe county, and as such administrator of Douglas B. Layne, deceased, Ann B. Layne, John J. Paxton and Eliza, his wife, Orville

T. Rodgers and Elmira, his wife, William B. Sprowl and Catharine S., his wife, Robert A. Dickson and J. Emma, his wife, Marietta Layne, Mary D. Layne, Thomas G. Alderson, Sarah Davis, Charles, L. Davis, Lewis Davis, Sidney Davis, Mary Davis and Lock Davis, were respondents. The decree from which the appeal was taken was pronounced on the 8th day of August, 1871, by the Hon. Joseph M. McWhorter, judge of the said circuit court.

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The opinion of the court contains a sufficient statement of the facts and pleadings, and of the statutes therein referred to.

*William Skeen*, of Virginia, *Caperton & Patton* and *James W. Davis* for the appellants.

*Samuel Price* for the appellees.

HAYMOND, PRESIDENT:

This cause was commenced in the circuit court of the county of Monroe in October, 1866, and the bill therein was filed at November rules of that year. The bill alleges that on the 3d day of March, 1859, Thomas Johnson and William Hinchman, Jr., purchased of Douglas B. Layne three tracts of land, two of them called islands, one of which Layne purchased of General A. W. G. Davis, and the other of Col. John Alderson, and both together containing thirty-five acres; the third tract containing four hundred and fourteen acres, more or less, which Layne purchased from Doctor Taylor, of Rockbridge county, and that Layne was to make them a good title by the first of December thereafter, but he was only to make such title to the islands as was vested in him; that afterwards, on the 23d day of November, 1859, Layne assigned a copy of the title bond of Davis and Alderson to Johnson and Hinchman, Jr. The copy of the title bond, with the assignment thereon by Layne, is filed with the bill, marked "No. 2:" That a deed of conveyance was made by Colonel John Alderson to Johnson and Hinchman for the lot which he was to convey, and is of record



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in the county of Monroe; that no deed was ever made by Davis and Alderson, the former of whom has died, leaving several legal heirs, who are named, and who are made defendants to the bill; that no title was or has been made for the tract of four hundred and fourteen acres; that Johnson and Hinchman were to pay \$6,000 by the first of December, 1859, and \$6,000 in annual instalments of \$1,000, the whole to draw interest from the first day of December, 1860, for the lands; that the first \$6000 was paid according to contract; and that sometime after the purchase, the county court of Alleghany county, Virginia, appointed a committee for the said Layne upon the ground that he had lost his mind, and was no longer capable of taking care of his person and property; that on the 4th day of September, 1860, the committee, Lewis P. Holloway, instituted suit in the circuit court of Monroe county, against Hinchman and Johnson, alleging in his bill that Layne was imbecile when the contract was made—incapable of making a contract, and that the lands had been sold at a price greatly below their value, and asking for a rescision of the contract; that Hinchman and Johnson answered the bill, denying the material allegations thereof, and many depositions were taken in the cause; that in this attitude of the cause, Holloway, the committee, and Johnson and Hinchman compromised the suit, and agreed to rescind the contract, restoring the parties to their original positions. A copy of this contract, marked No. 4, and a copy of the original contract are alleged to be filed with the bill; that by the compromise, Holloway, as committee, was to refund the money that was paid, with its interest; the outstanding bonds were to be returned, and Holloway was to pay a lawyer's fee of \$200; to dismiss the suit, each party paying his own costs; that Johnson and Hinchman were to pay rent for the land during the time they occupied the property, and were to have possession of the land until Christmas next thereafter; that Holloway was to pay for improvements; that if the parties could

not agree upon the adjustment, they were to refer the subject in dispute to arbitrators, and he (Holloway) was to come to Monroe county before Christmas and have the adjustment made; that Holloway failed to come, and Johnson and Hinchman selected two of their respectable neighbors, George W. Swope and Charles R. Hines, who examined the improvements and estimated the rents, and made a report, which is alleged to be filed with the bill, marked "No. 5." The bill also alleges that Holloway and Layne have both died since the making of the compromise, and that the estate of Layne has been committed to Lewis Ballard, sheriff of Monroe county, for administration; that the suit brought by Holloway, committee, has been discontinued; that William Hinchman, Jr., died intestate, unmarried and without child or children, leaving his father William Hinchman, his heir at law, and that William Hinchman, the father, has since died intestate, leaving a widow and divers children and legal heirs, who are named, and that plaintiff John Hinchman, is administrator of William Hinchman, Jr., deceased. It is also alleged that Layne died intestate, leaving a widow, Ann B. Layne, and several children and legal heirs, and that Layne left no personal estate in West Virginia; and that none will likely come into the hands of his administrator. The administrator of Layne, his widow and legal heirs are made defendants, and the bill prays that the contract of compromise made with Holloway, the committee, be enforced; that the lands be restored to the heirs of Layne, deceased, and they be required to pay back the purchase money which Hinchman and Johnson paid Layne, and that the same may be charged upon the lands; that Hinchman and Johnson may be paid for improvements and charged rents, as set forth in the contract of compromise, and that they be allowed credit for the \$200 counsel fee; and the bill also contains a prayer for general relief, &c.

It is alleged in the bill that the widow and all the legal heirs of Layne, deceased, reside out of this State.

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J. M. Byrnside, as guardian *ad litem* for Mary D. Layne and the other infant defendants, filed an answer, which is in the usual form, requiring proof of all the allegations in the bill. At December rules 1866 a decree *nisi* was entered against the adult defendants.

At January rules, 1867, the bill was ordered to be taken for confessed as to adult defendants, and the cause set down for hearing by the complainant's counsel.

On the 25th day of April, 1867, a decree was made in the cause, by the court, before any depositions were taken or evidence filed, other than the exhibits, so far as they were evidence, and the cause was referred to a master commissioner to take an account. In this decree, among other things, it is recited that "Sarah Miller, the wife of A. A. Miller, having departed this life leaving the following children and heirs at law, to-wit: James Miller, Elizabeth B. Miller, and George Miller, upon whose motion this cause is revived in their name, and more than two months having elapsed since the filing of the plaintiff's bill, and service of the subpoena upon the defendants Lewis Ballard, sheriff of this county, and as such administrator of Douglas B. Layne, deceased, Thomas G. Alderson, Sarah Davis, and Charles L. Davis, who failing to appear and answer the bill, the same is taken for confessed as to them, and the order of publication taken at rules against the defendants, Ann B. Layne, John J. Paxton and his wife, Orville T. Rodgers and his wife, William B. Sprowl and his wife, J. Emma Layne and Marietta Layne, and they still failing to answer, the cause is set down for hearing as to them, upon such evidence as the plaintiffs offered, and the cause coming on to be heard upon the bill, answer of the infant defendants, by their guardian *ad litem*, exhibits and arguments of counsel: Upon consideration whereof, &c."

Afterwards, on the 8th of July, 1867, the court made this decree in the cause to-wit: "On the petition of Lewis Ballard, sheriff of Monroe county, and as such

administrator of D. B. Layne, deceased, and others, and for reasons satisfactory to the court, it is adjudged, ordered and decreed, that the decree rendered in this cause, at the April term, 1867, of this court, be set aside and annulled, and this cause be re-opened and re-heard, with leave to the defendants, or either of them, to file their answers within thirty days, and otherwise defend this suit, as they may deem advisable.”

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On the 19th of September, 1867, the widow and adult heirs of Layne, deceased, with leave of the court, filed their answer to the bill, to which the plaintiffs replied generally. This answer admits the sale of the lands on the 3d day of March, 1859, as charged in the bill, and that respondents suppose the six thousand dollars was paid as charged in the bill, but they have no personal knowledge of the fact. These respondents also say that “they suppose and believe that Lewis P. Holloway, who was appointed a committee for their ancestor, D. B. Layne, made the compromise as is alleged in the bill.” But they deny that Holloway had the right or authority, to make the compromise made by him with Johnson and Hinchman, and insist that to make such a compromise was not within the scope and authority of the office of Holloway as such committee, and that in making it he transcended his authority, and that the alleged compromise is unequal and unjust, and ought not to be enforced by a court of conscience. They deny that the assessment valuation, made by Swope and Hines, filed by plaintiffs with their bill, is binding on them, it being *ex parte*. And they insist that Johnson and Hinchman having elected to make a contract of purchase “from an imbecile and weak-minded man, they should be compelled to abide by the same, and that the contract of sale, as originally made, should be confirmed and executed; but that if Johnson and Hinchman persist in asserting that Layne was a lunatic or weak and imbecile when the contract was made, and the contract of compromise should be confirmed, that, then, they should not

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**Ballard, Admr.** be allowed for the six thousand dollars paid. The answer concludes by praying substantially that the alleged compromise be adjudged null and void, or unequal, and that the contract of March 3d, 1859, be specifically, and specially executed.

On the 30th day of November, 1867, the court made a decree in this cause, as follows, to-wit: "It appearing to the court that in order to a proper decision of this cause, that the personal representative of Lewis P. Holloway, deceased, late committee of Douglas B. Layne, deceased, and also the securities of said Holloway, as such committee, should be represented in this suit, it is adjudged and decreed, that the plaintiffs amend their bill in this particular, so as to ascertain and make all the above named persons party defendants to this suit."

On the 29th day of April, 1868, the court, by decree, without deciding any questions presented in the cause, referred the cause to master commissioner, Alfred Phillips, to take an account, as therein specified.

On the 28th day of November, 1868, Lewis Ballard, sheriff, administrator, &c., appeared in court and filed a demurrer to the bill and the plaintiffs joined therein; and Ballard also filed his answer to which the plaintiffs replied generally. Ballard, in his answer, says that he never knew Douglas B. Layne, and cannot say whether he was sane or not; that he never knew Lewis P. Holloway, and he has no knowledge that Holloway was the committee of Layne, nor does he know that Layne was declared a lunatic; that he knows but little about the facts of the case, except what the papers in the cause show; that he believes it would be to the interest of the estate, which he represents to have the sale by Layne to Hinchman and Johnson confirmed, and that he thinks the equity of the case requires such decree.

On the 2nd day of December, 1868, the court made a decree reciting, that on that day the cause again came on to be heard upon the papers formerly read, and the report of master commissioner Alfred Phillips, made

pursuant to a previous order of the court, and the exceptions filed thereto, by the defendant's counsel, and was argued by counsel: It appearing to the court that the decree of the 30th day of November, 1867, requiring the plaintiffs to amend their bill, and make the personal representative of Holloway, a party defendant to the cause, had not been complied with, the court without acting on the report, or exceptions filed thereto, adjudged, ordered and decreed that unless the plaintiffs, within thirty days from that date, amend their bill and make the personal representative of Holloway a party defendant to the suit, "then the plaintiffs' bill should stand dismissed out of this court, with costs to the defendants, but without prejudice to any other suit which they might think proper to bring in the premises."

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On the 18th day of May, 1869, the court, on motion of the administrator, widow and heirs at law of Layne, deceased, by an order made in the cause, granted to them leave to file a cross-bill within thirty days, against the plaintiffs, for the purpose of enforcing any rights of the defendants, if any they have, against the plaintiffs.

Afterwards, on the 5th day of June, 1869, a bill, called in the record a cross-bill, was filed in the clerk's office and process issued thereon, but said bill is in fact more in the nature of an original than a cross-bill. The plaintiffs, in the cross-bill, set up the contract of sale of the 3rd of March, 1859, and ask that the lands be sold to pay the purchase money, &c.

The infant defendants to this cross-bill answered the same, by guardian *ad litem*, on the 16th of September, 1869.

At the same time the adult defendants to the cross-bill filed their joint answer thereto. In this answer it is insisted "that the time for filing a cross-bill had transpired, there being a decree in the cause which it was not in the power of the court to vacate or disannul, and which settled the principles upon which a final decree should

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be rendered." It is also therein objected that the cross-bill is, by law, an unnecessary pleading, and that the justice of the case did not require that it should be filed, and for that cause pray that the same may be dismissed. The answer then adopts the recitals and allegations of the original bill, and re-asserts them; but it alleges that there was paid of the purchase money of the land, not only the \$6,000, alleged in the original bill, but also two additional sums, to-wit, \$1,291.32, and \$150, as shown by the report of commissioner Phillips filed in the cause. But no reason or excuse is stated why the two last named payments were not stated as alleged in the original bill. It also insists that the contract of compromise is valid and binding, and that it was, and is, fair and just, and does no more than restore Johnson and Hinchman to the position which they occupied before the purchase was made, &c.

To these answers to the cross-bill a general replication was filed.

Afterwards, on the 20th day of May, 1870, the cause was again heard upon the papers formerly read, the cross-bill, answers thereto, replication, exhibits and arguments of counsel, report of commissioner Phillips and exceptions thereto, and the court, by its decree, rescinded, set aside and annulled the contract of sale of the 3rd of March, 1859, and determined and decided that the contract of compromise dated the 29th of March, 1861, made by Holloway, committee, and Hinchman and Johnson, and filed as "exhibit 4," should be carried into effect and be duly executed. And the court, with the view of carrying into effect the last named contract, appointed M. J. Kester a special commissioner for the purpose, to complete the account directed to be taken by the decree of April, 1867, and referred the report of commissioner Phillips, with the exceptions thereto, to the special commissioner, with authority to adopt or modify the same as he should think proper, from such evidence as was

then filed in the case, or might be brought before him; and the special commissioner was directed to report his proceedings to court. The court, in same decree, dismissed the cross-bill, at the costs of the plaintiffs therein.

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On the 8th day of August, 1871, the cause came on to be further heard on the papers formerly read, and report of M. J. Kester, special commissioner, with the exceptions thereto, and the exceptions to depositions, and was argued by counsel; Upon consideration whereof the court adopted the second statement of this report, whereby it appears that the estate of D. B. Layne, deceased, is indebted to the plaintiffs in the sum of \$8,540.11, as of the 18th of March, 1871, and decreed that the plaintiffs recover against the estate of Layne, deceased, the sum of \$8,540.11, with interest thereon from the 18th day of March, 1871, until paid, and the costs of suit; and overruled all the exceptions to the report inconsistent with said second statement. The court further decreed that unless said sum, with interest and costs, were paid to the plaintiffs within thirty days from the date of this decree, that Samuel Price and others, who were appointed commissioners for the purpose, should proceed to sell the tract of land in the bill and proceedings mentioned, on Greenbrier river, after giving notice, &c.

After this decree was entered, the defendants to the original bill in the court below, appealed in the manner prescribed by law, and it is now the duty of this Court to determine whether there is error in the proceedings of the circuit court, or whether those proceedings shall be affirmed as being right, just and equitable.

I have given as full a statement of the proceedings of the circuit court in this cause as is necessary to present the material questions to be determined here, and, in my judgment, a statement less full would fail to present those questions in such manner as to make the case, and the points determined by this Court, clearly understood.

It must be observed that the original bill and the record fail to disclose when the committee Holloway died,



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whether he died before or after Layne, or where he resided at his death; nor does it anywhere appear that Holloway ever had any money or personal effects of Layne in his hands, or that there was any effects of Holloway within this State at or after his death. But from all that does appear in the record the reasonable presumption is that Holloway and Layne both resided and lived before and at their deaths in Virginia. It does not appear how long Holloway and Layne lived after the date of the alleged compromise. Nor does the bill or record disclose that the suit brought by Holloway, as committee, was dismissed by Holloway in pursuance of the compromise, or in accordance with the terms thereof, in whole or in part; and they fail to allege or show that the suit of Holloway, as committee, was dismissed in pursuance of the alleged contract of compromise with the approbation or approval of the court in which it was pending. The bill does not allege that the suit was caused to be dismissed by Holloway for any cause; nor does it state when it was discontinued, or for what cause; or whether it was discontinued before or after the death of Holloway or Layne. No part of the record of the proceedings had in the case, brought by Holloway, is filed as an exhibit, or as evidence in this cause. The only allegation in the original bill in reference to the disposition of the suit is contained in one sentence, and is as follows: "The suit brought by the said Lewis P. Holloway, committee, &c., has been discontinued." The bill and record fail to disclose whether D. B. Layne, at the time the committee was appointed, had or was the owner of, any estate, real or personal, other than that involved in this suit; or whether there was any money or property in the hands or under the control of Holloway, as committee, at the date of the alleged compromise or afterwards, with or by which he could refund or pay to Johnson and Hinchman the purchase money it is claimed they paid on their contract of purchase. The bill does not allege or pretend that Hinchman and

Johnson under, or by virtue of, the alleged contract of compromise, ever delivered or offered to deliver, possession of the lands, or any part thereof, to Holloway as committee, or to any other person. The bill does not allege, nor is it anywhere admitted by the plaintiffs in the original bill, that Layne was a lunatic, or in anywise incapable of making a contract at the time he made the contract of sale to Hinchman and Johnson. The bill does allege that Johnson and Hinchman answered the bill filed by Holloway, denying the material allegations thereof. The bill does not allege, nor does the evidence show that the alleged contract of compromise was advantageous or beneficial to Layne to his estate; nor does the bill allege that the improvements for which compensation is claimed were permanent, valuable, or are still existing. The alleged contract of compromise is not filed with the bill, but a paper is filed marked "No. 4," which is alleged to be a copy, but no excuse for not filing the original paper is stated, and no evidence of the execution of the original is found in the record. Mary D. Layne, one of the legal heirs of D. B. Layne, an infant, and answers by guardian *ad litem*. The bill alleges that D. B. Layne purchased the four hundred and fourteen acre tract of land of Doctor Taylor, of Rockbridge county; it does not state whether Taylor had conveyed the land to Layne or whether the purchase money had been paid to Taylor or not. But it seems from the evidence of John Echols, as given in his deposition first taken in the cause, that Taylor's name was William, and that in the fall of 1859 he was dead, and there was then a large amount of purchase money due from Layne upon the four hundred and fourteen acre tract to the representatives and heirs of Taylor, and that no deed had been made to Layne for the land; that in order that a deed for the same might be procured the bonds executed by Johnson and Hinchman to Layne for the purchase money of the land purchased by them from him, situate on Greenbrier river, in Monroe county,

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were given to him (Echols) in the fall of 1859 by Layne, with instructions to collect upon them an amount sufficient to pay off what was still due from him to the heirs and representatives of Wm. Taylor, deceased, late of Rockbridge county; that Hinchman and Johnson paid to him (Echols), the whole amount due on their first bond to Layne, and a portion of their second bond, which was sufficient to pay off the entire amount due to Taylor's representatives, and which was paid over to W. J. McDowell Taylor, of Rockbridge, who was attending to the matters for himself, and the other heirs of William Layne's and Mrs. Susan P. Taylor; commissioner Phillips, in his report, says "that no money was ever paid into Layne's hands, but on the contrary, it all went to pay off a prior lien which existed on the land." The personal representatives and heirs of William Taylor, deceased, were never made parties to the cause.

The plaintiffs filed with their bill a copy of the order of the county court of Alleghany county, Virginia, made at the April term, 1860, thereof, appointing L. P. Holloway, committee to take charge of the estate of Douglas B. Layne. At the end of the copy is appended these words, to-wit: "A true transcript from the records of the said court. Teste: Joseph A. Fudge, Clerk." The copy is headed "Alleghany county court, April Term, 1860." This is the only record evidence found in the cause proving or tending to prove, that Holloway was appointed committee of Layne, deceased.

*First.* It is objected, and insisted by appellant's counsel that this copy should not have been read as evidence by the circuit court and cannot be in this Court, because it is not properly certified. It appears by the record that the reading of the copy as evidence, was excepted to in the circuit court upon the ground, that, "it is not properly certified," and also upon the ground that "it is not competent evidence." The order is, in the usual form, sufficiently full, and if it is sufficiently certified to, enti-

tles it to be read as evidence, it is competent, and in fact the proper evidence, to prove that Holloway was appointed committee for Layne, by the county court of Alleghany, at its date. By an act of the Legislature of this State passed on the 28th day of February, 1866, it is provided, "That a copy of any record, or paper, in the clerk's office of any court in the State of Virginia, or in the office of the Secretary of the Commonwealth, Treasurer, Register of the Land Office, or either Auditor, or any surveyor of the State, attested by the proper officer in whose office the same is, may be admitted in evidence in lieu of the original." See acts of the Legislature of this State of 1866, page 108. This provision of the Act of 1866, is re-enacted and continued in the Code of this State, enacted in 1868, and which took effect the first day of April, 1869, as may be seen by the fifth, sixth and seventh sections of chapter one hundred and thirty of the Code. These sections of the Code have not been repealed, and are still in force. The copy of the order under consideration is properly certified to entitle it to be read as evidence under the laws of this State, to which I have referred, and the objection made, that it is not properly certified, must be overruled.

*Second.* It is also objected by the appellants, that all the orders, decrees and proceedings of the circuit court made in the cause, after the 2nd day of December, 1868, are erroneous, and should be reversed and set aside, because the decree made by the court, at that date, adjudged, that unless the plaintiffs, within thirty days from the date of the decree, amended their bill, and made the personal representative of Holloway, a party defendant to the suit, that then the plaintiffs' bill should stand dismissed out of this court, with costs to the defendants, but without prejudice to any other suit," &c.; and as the plaintiffs failed to so amend their bill, within the thirty days, the cause, by operation of the decree, stood dismissed out of court.

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From the proceedings of the court, and the acts and doings of all the parties in the cause, subsequent to the date of the decree, it is evident that neither the court, or any of the parties, regarded the decree as amounting to an absolute dismissal as now insisted. The defendants in the circuit court, at the May term, 1869, after the date of the decree, on motion, obtained leave of the court to file a cross-bill in the cause. They afterwards did file their cross-bill to which the defendants therein filed their answers. A large number of depositions were taken in the cause, after the decree, by each of the parties, and, so far as can be seen from the record, no objection was made by either party to the cause being proceeded with, by the circuit court, and heard and determined, on account of, or by reason of, the cause being dismissed or out of court. It was at the instance of the appellants that the first action of the court was had and taken in the cause, after the expiration of the thirty days from the date of the decree. It is clear that the court, after the decree was made, became satisfied that it was not necessary that the personal representative of Holloway should be made a party in order to a final and proper decree in the cause, as between plaintiffs and defendants therein; or else it would have refused to proceed with the cause, unless such personal representative was made a party. Under all the circumstances appearing in the cause, I think it would be unequitable and wrong to hold that the proceedings of the court, after the expiration of thirty days from the date of the decree, are erroneous, and should be reversed for the cause claimed. If the decree was regular and proper, in any case, according to its terms, literally considered, and without looking to the object and purpose of the court in making it, still I think, under all the circumstances, it may be held, properly, that the parties consented to the cause being proceeded with. In the case of *Brown v. Belches*, 1 Wash., 9, it was held, that "after reference to arbitrators whose award, it was agreed, should

be the judgment of the court, a trial was had, by jury, without discharging the order of reference ; yet the verdict and judgment were not set aside, it being inferred that the trial was by consent." I do not think it was necessary that the personal representative of Holloway should have been made a party to the cause, in order to its proper decision, looking to the objects of the bill ; and if the circuit court had dismissed the bill, absolutely, for this cause, the decree of dismissal would have been erroneous and so treated by an appellate court. It is manifest that the appellants, after the expiration of the thirty days, by their acts and doings throughout, recognized the cause as not being dismissed, but as still being in court, to be proceeded with to determination, and so of the circuit court, and plaintiffs in the cause. The decree, so far as the record discloses, was not made at the instance of the appellants, but by the court of its own motion, and to allow the appellants objection, now made for the first time, to prevail, under the circumstances, would, it seems to me, operate evil, surprise and injustice, in practice, without accomplishing any valuable end or purpose in this cause. This objection of the appellants must, under the circumstances, appearing by the record in this case, be overruled as not being well taken here.

*Third.* It is objected by appellants, that the court erred in not overruling the demurrer filed to the plaintiffs bill before proceeding to decree. It must be considered that the court, in making the decree of May 20, 1870, did consider the sufficiency of the bill and substantially overrule the demurrer. This objection must therefore be overruled.

*Fourth.* It is also objected, by the appellants, that the decrees of the circuit court of the 20th of May, 1870, and of the 8th of August, 1871, are erroneous, and should be reversed, because, under the circumstances, the alleged contract of compromise and rescission set up in the bill, and prayed to be enforced against the personal represen-

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tative and legal heirs of D. B. Layne, deceased, ought not to be enforced by a court of equity. This objection presents for consideration and determination questions of great importance and interest, not only to the legal profession but to all citizens. And I enter upon their consideration with a full appreciation of their great importance as well as distrust of my ability to give them a just and proper solution. Notwithstanding the law authorizing the county and circuit courts to appoint committees for lunatics, was enacted, and in force for many years in Virginia prior to the formation of this State, and has been continued in force in this State, since its formation, as to the circuit courts, strange, as it may appear, there has not heretofore been any decision, by the Supreme Court of Appeals of either State, defining the powers and authority of the committee, over the real and personal estate of the lunatic, his right to make contracts in relation thereto, the extent of such right, and how far it is the duty of the courts to enforce the same, under the law. I have not been able to find a case in either State where a bill has been filed to enforce the specific execution of a contract of a committee of a lunatic, for the purchase or sale of real estate, or for the enforcement of a contract of rescission such as is presented in this case, or in anywise analagous thereto in principle.

The alléged contract of rescission and compromise is in these words, viz: "This article of agreement, made and entered into this 29th day of March, 1861, between Lewis P. Holloway, committee of D. B. Layne, of the one part, and William Hinchman, Jr., and Thomas Johnson, of the other part, witnesseth: That the said Lewis P. Holloway pledges himself to come to the house of the said Thomas Johnson on the 18th day of April, 1861, for the purpose of consummating a compromise of a suit in chancery instituted in the circuit court of Monroe county, in which said Holloway is plaintiff and the said Hinchman and Johnson are defendants, upon the following terms here agreed upon, to-wit: That the said

Lewis P. Holloway binds himself to pay to said Johnson and Hinchman, the amount of money they have paid to John Echols for land bought of D. B. Layne, with interest from the time of said payment until all of it is refunded by said Holloway; and said Holloway is to return to them, the said Hinchman and Johnson's bonds given to said Layne for the purchase money for said land; and the said Holloway is to pay said Johnson and Hinchman's lawyer's fee, amounting to \$200, and to dismiss the suit upon the terms, to-wit: That each party is to pay his own costs in said suit. The said Johnson and Hinchman are to pay the said Holloway rent for the said land during the time they occupied it, and the said Johnson and Hinchman are to have possession of said land until Christmas and have the privilege of moving their grain, &c., and are to pay said Holloway for the corn and oats they sow and raise this season, the usual grain rent; and the said Holloway is to pay the said Johnson and Hinchman for the improvements they have made upon said land, and if they cannot agree as to the value of said improvements they are to choose disinterested persons to value same. The said Holloway is to take for the rent of the islands, rented by the said Hinchman and Johnson the usual grain rent, or the rent that said Johnson and Hinchman are to get for the same.

Witness the following signatures and seals:

(Signed.) LEWIS P. HOLLOWAY, COM., (Seal.)

THOMAS JOHNSON, (Seal.)

WILLIAM HINCHMAN. (Seal.)"

The fiftieth section of chapter eighty-five, of the Code of Virginia of 1860, provides that, "If a person be found to be insane, by justices before whom he may be examined, or in a court in which he may be charged with crime, as aforesaid, the court of the county or corporation, of which he is an inhabitant, shall appoint a committee of him." The fifty-second section of same chapter provides, that, "If a person residing in this state, not so found, be suspected to be insane, the court

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of the county or corporation of which such person is an inhabitant, shall on the application of any person interested, proceed to examine into his state of mind, and being satisfied that he is insane, shall appoint a committee of him." The fifty-third section of the same chapter gives the circuit courts concurrent jurisdiction with the county courts in such cases. The fifty-fifth section of same chapter of same Code, provides that, "The committee of an insane person shall be entitled to the custody and control of his person (when he resides in the State, and is not confined in an asylum or jail), shall take possession of his estate, and may sue and be sued in respect thereto, and for the recovery of debts due to, or from, the insane person. He shall take care of and preserve such estate, and manage it to the best advantage; shall apply the personal estate or so much as may be necessary, to the maintenance of such insane person, and of his family, if any; and shall surrender the estate, or so much as he may be accountable for, to such insane person, in case he shall be restored to sanity, or the real estate to his heirs or devisees, and the personal estate to his executors or administrators, in case of his death without having been so restored to sanity." The fifty-sixth, fifty-seventh and fifty-eighth sections of same chapter, provide that if the personal estate of such insane person be insufficient for the discharge of the debts, or if the personal estate or the residue thereof, after payment of the debts, and the rents and profits of his real estate, be insufficient for his maintenance, and that of his family, if any, the committee of his estate may petition the court, by which he was appointed, for authority to mortgage, lease or sell, so much of the real estate of such insane person as may be necessary for the purposes aforesaid, or any of them; setting forth in the petition the particulars and amount of the estate, real and personal, the application which he has made of any personal estate, and an account of the debts and demands existing against the estate; and that on the presenting of

such petition it shall be referred to a commissioner in chancery to inquire into and report upon the matters therein contained; whose duty it shall be to make such inquiry, to hear all parties interested in such real estate, and to report thereon with all convenient speed; and if, upon the coming in of the report and examination of the matter, it shall appear to the court to be proper an order shall be entered for the mortgage, leasing or sale (on such terms and conditions as the court may deem proper), of so much of the said real estate as may be necessary. But no conveyance shall be executed until the sale shall have been confirmed by the court. The proceeds of the sale shall be received and applied under the order of the court.

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The first section of chapter thirty-six of the Code of 1860 provides, that where an infant, insane person or married woman is entitled to or bound to renew any lease, any person on his or her behalf, or any person interested, may apply, by petition or motion, in any summary way, to the circuit court of the county or corporation in which the lands leased, or some part thereof, may lie, and by the order of the said court any person appointed by it, may, from time to time, surrender, or accept a surrender, of such lease, or take or make a new lease of the same premises, for such term and with such provisions as the court shall direct. Such reasonable sums as may be incurred to renew any such lease shall, with interest thereon, be paid out of the profits of the leasehold premises and be a charge thereon till such payment.

And the second section of the same chapter provides, that if the guardian of any minor, or the committee of any insane person, think that the interest of the ward or insane person will be promoted by a sale of his estate, or estate in which he is interested with other infants or adults such guardian or committee, whether he or the minor, insane person or any of the persons interested reside in this State or not, may for the purpose of obtaining such

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sale, file a bill in equity in the circuit court of the county or corporation in which the estate proposed to be sold, or some part thereof may be, stating plainly all the estate, real or personal, belonging to such infant or insane person, and all of the facts calculated to show the propriety of the sale: That the bill shall be verified by the oath of the plaintiff and the infant or insane person, and all others interested, shall be made defendants; and also where there is an infant or insane defendant, all those who would be his heirs or distributees, if he were dead, shall be made defendants. In subsequent sections of the same chapter it is provided, that to every such infant or insane defendant there shall be appointed a guardian *ad litem*, who shall answer the bill, on oath, in his proper person: That no deposition shall be read in the suit against any infant or insane person, unless it be taken in the presence of the guardian *ad litem*, or upon interrogatories agreed on by him: That if it be clearly shown, independently of any admissions in the answers, that the interest of the infant or insane person will be promoted, and the court is of opinion that the rights of no person will be violated thereby, it may decree a sale of said estate, or any part thereof, taking for the purchase money, when the sale is on credit, ample security; and, if the sale be of real estate, retaining a lien thereon: That at such sale the guardian, or guardian *ad litem*, or committee, shall not be a purchaser directly or indirectly: That the proceeds of sale shall be invested, under the direction of the court, for the use and benefit of the persons entitled to the estate. But into whosever hands the proceeds may be placed, the court shall take ample security, and from time to time require additional security, if necessary, and make any other proper orders for the faithful application of the fund, and for the management and preservation of any property or securities in which the same may be invested, and for the protection of the rights of all persons interested therein, whether such rights be vested or contingent: That what

may be received under this, or the one hundred and twenty-fourth chapter, for the real estate of an infant or insane person, sold or divided, or so much thereof as may remain at his death intestate, shall, if he continue till his death incapable of making a will, pass to those who would have been entitled to the land if it had not been so sold or divided.

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Each and all these provisions of the Code of 1860 were in force in Virginia at the time Holloway was appointed committee, and continued in force therein until the formation of this State, and from thence till the adoption of the Code of 1868 of this State, now in force; and were substantially, if not literally, re-enacted and contained in the Code of 1868, except the last sentence of section two of chapter of one hundred and twenty-eight, and are still in force.

In the laws as contained in the Code of 1860, which I have quoted, and the ancient established rules governing courts of equity, is to be found, and from them is deduced, the power and authority of the committee Holloway to make the alleged contract of rescission and compromise set up in this case, if such power and authority exists. From the laws cited by me, we see that although the committee is required to take possession of the estate of the lunatic, and may sue and be sued in respect thereto, still if the personal estate of the insane person is not sufficient for the discharge of his debts, or if the personal estate or residue thereof after payment of the debts, and the rents and profits of his real estate are insufficient for his maintenance and that of his family, the committee is not authorized to mortgage, lease or rent the realty of the insane person to raise money for the purpose. But the court, by which he was appointed, upon the petition of the committee, upon a proper case being made thereon, after all parties interested are heard, is empowered to make an order to direct the realty, or so much thereof as may be necessary for the purpose, to be mortgaged,

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leased or sold, and no conveyance to be executed until the sale, where one is directed, is confirmed by the court, and the proceeds of the sale to be secured and applied under the order of court. Also, when the interest of the insane person will be promoted by a sale of his estate, the committee, for the purpose of obtaining such sale, is authorized and empowered to file a bill in equity, verified by his oath, in the circuit court of the county in which such estate, or part thereof is situated. A guardian *ad litem* is required in such case to be appointed to defend the interest of the insane person involved in the the suit, and no deposition can be read therein, unless taken in presence of the guardian *ad litem*, or upon interrogatories agreed on by him. And at the hearing of the case, if it be clearly shown, independently of any admissions in the answers, that the interest of the insane person will be promoted, and the court is of opinion that the rights of no person will be violated, it may decree a sale of the estate, or any part thereof. But the whole proceeding is to be under the direction of the court, and the proceeds of the sale to be invested under its direction for the benefit of the insane person. To such bill the law, as contained in the Code of 1860 required that all those who would be the heirs or distributees of such insane person, if he were dead, should be made defendants. Also, whatever is received for the real estate of the insane person, under chapter one hundred and twenty-eight, or as much thereof as may remain at his death, intestate, shall, if he continue till his death incapable of making a will, pass to those who would have been entitled to the land if it had not been sold. The committee is required to take care of the estate and manage it to the best advantage—to apply the personal estate, as far as necessary, to the payment of debts of the insane person, and the rents and profits of the residue of his estate, real and personal, and the residue of the personal estate, or so much as may be necessary to the maintenance of the insane and his family; and shall surren-

der the estate, or so much as he may be accountable for to the insane person, in case he is restored to sanity, or the real estate to his heirs or devisees, and the personal estate to his executors or administrators, in case of his death without having been restored to sanity.

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The committee is not authorized to change the nature of the estate of an insane person without the direction or approval of a court having jurisdiction of the subject.

Fonblanque in his work on Equity says, "the committee of a *non compos* is but a bailee, and accountable to his representatives." Side page 57. In *ex parte Marchioness of Annandale*, 1 Ambler 81, Lord Hardwicke states it to be "a rule never departed from, not to vary or change, the property of a lunatic, so as to effect any alteration as to the succession to it;" but in *ex parte Grimstone*, 1 Ambler 706, Lord Apsley, C., decreed incumbrances paid off in the lifetime of the lunatic, out of savings of the estate, to be assigned to attend the inheritance, and not in trust for the next of kin; he considering the ruling principle in the management of a lunatic's estate, to be the doing of that which is most beneficial to the lunatic. "In the management of a lunatic's estate, the interest of the lunatic is more regarded than the contingent interest of those who may be entitled to the succession. And the court, if it be for the interest of the lunatic, will direct timber, on the land of the lunatic, to be sold. So the real estate may be converted into personal, or personal into real, if for the benefit of the lunatic." 3 Johns. Ch. (N. Y.) 347. "If the committee misconducts himself or becomes bankrupt, he will be removed." 2 Mad. Ch. 745. "The committee of a lunatic's estate is not authorized to purchase real estate with savings, and alter the nature of the property; and land so purchased will be considered as personal estate." Same author 747. "Money may be laid out in improvements, if no good reason be shown why it should not. But in these cases the committee acts at his peril, unless he has pre-

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viously procured an order of the court, which it is always prudent to obtain." Same author 749. I think it is clear that the conduct and acts of a committee of an insane person, in relation to the estate of a lunatic, are subject to the direction, rescission, approval or disapproval of the court having jurisdiction of the subject.

It is competent for the committee in a proper case to institute suit to set aside acts done by the insane person during his lunacy, and prior to the appointment of the committee, especially where such acts are prejudicial, and not beneficial to the interest of the lunatic. But it is for the court to say whether the act shall or ought to be set aside under the circumstances of the case. Chief Justice Story, in the first volume of his Eq. Juris. section 228, says: "But courts of equity deal with the subject upon the most enlightened principles; and watch with the most jealous care any attempt to deal with persons *non compotes mentis*. Wherever, from the nature of the transaction, there is not evidence of entire good faith (*uberrimæ fidei*) or the contract or other act, is not seen to be just in itself, or for the benefit of these persons, courts of equity will set it aside, or make it subservient to their just rights and interests. And so, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo* or in the state in which they were before the purchase."

It cannot be held with any assurance or confidence of safety to the unfortunate insane, their families or estates, that the fact, that a committee may sue or be sued touching the real estate of the insane person, gives him such complete control, and arbitrary discretion in the disposition of the subject of the suit, as to authorize him, at his pleasure, to make a contract of compromise with the same binding and conclusive effect against the

insane person, his estate, heirs, or representatives, as if it were his own property, and he was acting for himself in the premises. Where such contract is made by a committee of an insane person, it should be done by the direction or receive the sanction of the court in which the cause is pending, or of the court by which he was appointed, especially when it changes the nature of the estate or any part thereof, or disposes of the subject of the suit, as in this case, in whole, or part; otherwise it must be held that the contract, in and of itself, is not binding, as against the insane person, his estate, personal representatives or legal heirs. I apprehend that a court of equity will, in no case, give effect to such contract, where it is made without the direction or sanction of the court, as before indicated, and without being satisfied, after careful and full examination of the transaction, that the compromise was proper, and beneficial to the interest of the insane person. To hold otherwise would be to disregard the true spirit, if not the letter, of the law, and to leave the insane and their estates, easy victims to inconsiderate or unscrupulous committees. A committee of an insane person should not institute a suit to set aside a contract made by the insane person prior to his appointment, on the ground of insanity, unless the person was insane, or there are reasonable grounds to believe he was insane, at the time the contract was made. If the person was sane when the contract was made, and the contract is otherwise valid and binding, the court would not set it aside. And though the person was insane when the contract was made, still if it clearly appears that the transaction was in good faith and was beneficial to his interests, the court will not set it aside, in all cases, as a matter of course, at the instance of the committee. So, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the insane party, a court of equity will not interfere to set aside the contract, if injustice will thereby be done to the other side,

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and the parties cannot be placed *in statu quo*, or in the state in which they were before the purchase. Therefore, if Layne, deceased, at the making of the contract of the 3d of March, 1859, had sufficient capacity to make the same, the contract being otherwise good, then the committee, Holloway, had no right to sue to set it aside, for that cause, or to rescind the same by contract of compromise, or otherwise. In that case it was his duty to enforce the performance of the contract so far as in his power. The plaintiffs do not claim in their bill that Layne was insane on the 3d of March, 1859, that he then did not possess sufficient capacity to make the contract of sale. The evidence in the cause proves that the land was sold at its full value; and if the annual rents and profits of the land are not worth more than is claimed by the plaintiffs and as a majority of the witnesses examined on that subject prove them to be worth, then the annual interest of the twelve thousand dollars, the purchase money, is worth near three hundred dollars more than the annual rents and profits of the lands. Further, it appears that Layne, at the time he made the sale, was indebted on the purchase money of the four hundred and sixteen acre tract, to Taylor's representatives and heirs in the sum of six thousand dollars or seven thousand dollars and that this debt was a lien on the land; and, for aught that appears in this record, Layne had no means to pay it, except by a sale of the land. Layne, it seems, not long after the sale, placed the purchase money bonds, or part of them, given to him by Johnson and Hinchman, into the hands of John Echols to collect and apply so much thereof as necessary to pay the purchase money he was in arrear to Taylor's representatives, in order that he might obtain a deed for the land; and Echols did collect of the bonds over seven thousand dollars, sufficient to pay the balance of purchase money in arrear from Layne to Taylor's representatives, and paid the same in discharge thereof. Shortly after all this was done, Holloway was appointed

committee, and no part of the residue of the purchase money, contracted to be paid by Hinchman and Johnson to Layne has ever been paid, which, at this time, including interest, must amount to seven thousand dollars, or perhaps more. The plaintiffs prove, by some four or five witnesses, who were well acquainted with Layne, some of whom transacted important business with him after the 3d of March, 1859, that he was of sufficient capacity to transact business at that date and afterwards, and before the date of the appointment of committee, Holloway. Commissioner Phillips, who was directed to enquire and report on the subject, in his report to the court, says, "that, from all the evidence presented to him, he is of opinion that the mental incapacity of Douglas B. Layne, deceased, at the time he made the contract with Johnson and Hinchman was not of such a character as to unfit him from making a valid contract."

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The defendants at some stage of the case, took the depositions of several witnesses to prove that Layne was insane on the 3rd of March, 1859, and before and after; but none of these witnesses were the attending physician of Layne, if he had any, or experts in such cases, and they simply give their opinions, generally, as to the state of his mind without stating the facts, circumstances or anything upon which their opinions are based, and none of them seem to have been present when the contract was made, or testify that they saw him on that day. Such evidence, while perhaps it may be read and considered, is entitled to but little weight or force, in and of itself, and is, I think, alone, generally insufficient to authorize a court to declare or decide, any person to be insane, especially where it is otherwise shown, by the circumstances and other competent evidence. "But the mere fact that a person is of weak understanding, if there be no fraud or surprise, is not an adequate cause of relief." Adam's Equity 432 and 433. "Mere weakness of mind, short of actual idiocy or insanity, whether produced by old age or other causes, is not enough to call for the in-

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terference of equity ; but where there is imposition or undue influence, it will be a very important ingredient in determining the question of fraud." Same author 433, note 1 and authorities there cited. I do not understand the defendants to claim that the depositions taken and filed by them are sufficient to establish the incapacity of Layne to contract. In their answer and cross-bill they claim the enforcement of the contract of the 3d of March, 1859. In this case, under the circumstances, and facts, as they appear, the contract of sale of the 3d of March, 1859, was sensible, prudent, and beneficial to the interests of Layne, and was *bona fide* and made without undue influence or fraud. I see no cause for its rescission, and none appears to have existed at the date of the alleged contract of compromise and rescission. Johnson and Hinchman were placed in possession of the property about the time they made the purchase, and they have had the uninterrupted use and enjoyment thereof ever since. It is not alleged, nor does it appear, that Holloway, as committee, had money or property with which to refund to Johnson and Hinchman the purchase money they had paid; and so far as the court can see the money could not have been raised by him, except by a sale of the land. This he could not do, and the sale would most likely had to have been made at public auction, at the suit of Johnson and Hinchman, no matter what the sacrifice, as now insisted by the plaintiffs. It would seem this must have been contemplated as the result. The alleged compromise changes the nature of the estate ; it provides, in effect, that the estate of Layne shall pay the plaintiffs' costs in the suit brought by Holloway and \$200 counsel fee of Johnson and Hinchman, and that Johnson and Hinchman should be paid for improvements, whether beneficial or not, and without ascertaining the amount. It also provides for the payment of interest to Johnson and Hinchman upon the money paid by them, and for the payment of rent by Johnson and Hinchman. The value of the improvements and rent was to be ascer-

tained in future. It does not fix the rent at the interest on the purchase money. Why Holloway never attempted to consummate the alleged compromise is not stated. He may have died—his powers may have ceased soon after its date, or he may have been advised that he had not power to make it, or concluded, that if consummated, it would be injurious and detrimental to the interests of Layne. Be this as it may, as the case is presented the alleged compromise was not and is not beneficial to the interest of Layne, but prejudicial thereto, and should not be enforced against his personal representatives and legal heirs.

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If Holloway, as committee, could make a contract binding upon the insane person, his estate, personal representative or heirs of the character I have been considering, and a court of equity would enforce it, still I do not think the alleged contract is a final contract, such as courts of equity require to entitle the party claiming the benefit thereof to a decree of specific performance. Lewis P. Holloway pledges himself to come to the house of the said Thomas Johnson on the 18th day of April, 1861, for the purpose of consummating a compromise of a suit, &c., upon the following terms here agreed upon, to-wit, &c.: The word 'consummating,' as here used must be construed to mean 'completing' the times of payment of the money Johnson and Hinchman had paid Echols is not fixed, though it is evident it was not contemplated that it should all be paid in hand. The amount of the rent to be paid is not specified, except the rent for that season. Holloway is to pay Johnson and Hinchman "for the improvements they have made upon said land, and if they cannot agree as to the value of said improvements, they are to choose disinterested persons to value the same." The number of persons to be chosen, or who, in case of disagreement, are not specified. The contract of sale of 3d of March, 1859, is not mentioned, or the description of writing Hinchman and Johnson

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are to make and deliver, reconveying or transferring the interest they acquired in the lands by the contract of 3d of March, 1859, and the assignment of exhibit No. 2, and the deed made to them by John Alderson for part of the land. From a careful consideration of all the circumstances and facts, and a careful examination of the writing. It appears to me that the writing is at most only the terms agreed on as a basis of an agreement, and not the agreement itself. There is no binding agreement such as equity will enforce by decree of specific performance, when the writing appears only to be terms agreed on as a lien for an agreement, and not the agreement itself; or when it provides that any of the terms are afterwards to be settled, or when the matter is unconcluded, and one party may still withdraw his consent, or where there appears any design of further negotiation. Fry on Specific Performance of Contracts, New Am. Ed, 230 and 342; *Graham v. Coll, Executor*, 5 Munt, 396; *Milnes v. Gery*, 14 Ves. Ch. (Jr.), 400; *Baker v. Glass*, 6 Munf. 212, and the cases there cited. But whenever the formal agreement contemplated is to be anything more than ancillary to the real agreement; whenever any new term might be introduced into the formal agreement not contained in the earlier one, the first agreement, will not be binding. And whenever the conclusive nature of the arrangement does not evidently appear in the writing, the fact that a subsequent and more formal agreement was intended to be entered into, will be strong evidence that the previous negotiations were not intended to amount to an agreement. Fry on Specific Performance of Contracts, 233.

The court will refuse to act, even when it only rests reasonably doubtful whether what passed was only treaty, let the progress towards the confines of agreement be more or less. Per. Lord Eldon in *Huddleston v. Briscoe*, 11 Ves. Ch. (Jr.) 592; Fry on Spec. Per. Con., 232.

For these reasons, I think said decrees are also erroneous, and should be reversed.

*Fifth.* It is also objected by the appellants that it was error in the circuit court to decree a sale of the land without the personal representative and legal heirs of William Taylor, deceased, being made parties to the plaintiffs' bill. As the case appears, this objection is well taken. It would prejudice the sale of the property to sell it without the court first ascertaining if the lien of Taylor for purchase money had been satisfied, and providing for its satisfaction, if not satisfied. And, as before remarked, it seems that the legal title is still in Taylor's heirs, or at least it does not appear in the case that Taylor or his heirs conveyed the four hundred and fourteen acres of land, although it is probable the conveyance should be made. For these reasons, the personal representative and legal heirs of Taylor should have been made party defendants before decree of sale, otherwise, the sale, if made, would be prejudicial. "If it appear on the face of the record that proper parties to the suit are wanting, the decree will be reversed, unless the objection was expressly relinquished in the court below." *Sheppard's Ex. v. Starke*, 3. Munf. 29; *Clark v. Long*, 4 Rand 451.

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*Sixth.* The appellees insist that the court erred in allowing Ballard, administrator, and the widow and heirs of Layne, deceased, to file their answers, and also the cross-bill, after the decree of 25th of April, 1867; and also erred in setting aside that decree on the 8th of July, 1867.

The decree is interlocutory and might be opened or set aside by the court on petition for a rehearing. *Laidley v. Merrifield*, 7 Leigh, 346. *Cocke's Adm'r v. Gilpin*, 1 Rob., 20. In the case last cited judge Baldwin, on page 31, says: "Where can be the mischief or inconvenience, whenever the judicial action of the court itself, in the cause, has not been perfected, of permitting it to control the ministration of its servants, and even to turn back and correct its own errors of omission and commission, instead of driving the parties into an appellate forum?" The fifty-third section of chapter one hundred and twenty-five of the Code of this State is in these words:

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The decree was set aside "on the petition of Lewis Ballard, sheriff of Monroe county, and as such administrator of D. B. Layne, deceased, and others, and for reasons satisfactory to the court." The petition is not copied into the record, and this Court is therefore uninformed of its contents. But it does not appear, by any return, that process in the cause was served on Ballard, or any other party; nor does it appear that an affidavit was filed of the non-residence of any of the parties; nor is there an order of publication, in the record, as to any absent defendants; nor does it appear, either in the decree of 25th of April, 1867, or elsewhere, that an order of publication had been duly executed as to any absent defendants. In this condition of the record this Court will not determine that the decree of the 8th of July, 1867, was, or is, erroneous, when it can well see, from the record, why it may have been right and proper. After the decree was set aside, without objection, so far as the record discloses, Layne's widow and heirs appeared and filed their answer, with leave of the court, without objections from the plaintiffs, and the defendants filed their general replication thereto. Afterwards the court granted leave to Ballard and the widow and legal heirs to file a cross-bill in the case, which was done. Much of the reasoning applies to this objection of appellees, which has been given for overruling the appellants' objection, that the plaintiffs' cause was dismissed and out of court after the expiration of thirty days from the date of the decree of 2nd of December, 1868. Besides, I do not see what the objection could avail, if sustained, because the view taken in this opinion of the merits of the case reaches and applies as well to the decree of the 25th of April, 1867, as to any other decree in the cause. The objection of appellees to the

decree of July 8, 1867, and to the filing of the cross-bill must, under the circumstances, be overruled. The contract of sale of the 3rd of March, 1859, must be carried into effect, if it can be done according to the principles governing courts of equity in such cases; and the Court does not see, from anything now appearing, why it may not be done. But before the case is further proceeded in, with that view, the cross-bill, as it is called, must be amended, and Mary D. Layne, the personal representative and legal heirs of A. W. G. Davis, deceased, and the personal representative and legal heirs of William Taylor, deceased, must be made party defendants thereto, and all other persons in interest, not now parties, with proper averments.

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Several other points were made in the case by the appellants, but under the views expressed upon the merits of the case, and the disposition which must be made of it, those points are immaterial, and are not necessary to be now considered and determined.

For these reasons the decrees rendered in this cause, by the circuit court of the county of Monroe, on the 20th day of May, 1870, and the 8th day of August, 1870, must be reversed and annulled and the appellants recover against the appellees their costs in this Court expended. And this Court proceeding to render such decree as the court below should have rendered, it is adjudged, ordered and decreed that the original bill filed in the cause be dismissed and that the defendants in said original cause recover against the plaintiffs therein their costs about their defence in the court below therein expended. But this dismissal of said original bill is without prejudice to any of the rights of the defendants therein, or any of them under the said contract of sale by Douglas B. Layne to Thomas Johnson and William Hinchman, Jr., of the lands in the original bill mentioned, and without prejudice to any rights set up in the said cross-bill and the right to prosecute the same furth-



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er as hereinafter directed. And the cross-bill cause must be remanded to the circuit court of Monroe county with leave to the plaintiffs therein to file an amended bill, making additional parties, and for further proceedings to be therein had as though it was an original bill, according to the principles decided in the foregoing opinion, and the rules governing courts of equity.

PAULL and MOORE, Judges, concurred.

HOFFMAN, Judge, did not sit in the argument and decision of the case, by reason of sickness.

DECREES ON ORIGINAL BILL REVERSED AND CROSS-BILL CAUSE REMANDED FOR FURTHER PROCEEDINGS.

## CHARLESTON.

## SALT COMPANY v. BROWN.

February 25, 1874.

An incorporated company, being the owner of coal lands, desires to obtain a subterranean right of way through or under the lands of another person, for the purpose of mining, and removing its own coal and applies to court for the benefit of the forty-fourth and forty-fifth sections of chapter forty-three of the Code.

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The report of the commissioners and the evidence in the case, show that the company is the owner of some thirty acres of coal land, from which the coal could not be mined and transported without going through the land of the defendants; that the company use said coal for the purpose of manufacturing salt at their furnaces, and to sell to the people living in and about the town of Hartford City; that the people living in and about said town could obtain coal, also, from other sources and that the public would not use the subterranean way set out and described in the commissioners' report, through the land of the company, but the company only.—

HELD:

That the report and evidence do not show that the purpose for which the property is to be taken is of such public utility as that said report should be confirmed by the court, under the forty-fifth section of said forty-third chapter of the Code.\*

\*The following are the sections referred to in the syllabus and opinion of the Court:

*Right of way, etc., to timber and mineral lands.*

"44. Any person owning land having timber upon it or containing coal, ore, or other minerals, who desires to obtain a subterranean or surface right of way, by railroad or otherwise, under, through, or over land belonging to another, or over any railroad, canal, state or county road, for the purpose of mining for such minerals, or conveying such timber or minerals to market, or for the purpose of draining any coal or mineral lands under, through, or over lands belonging to another, or who desires to obtain land on or near a railroad, or navigable stream, or public road, for a place of deposit, sale, and shipment of such timber or minerals, may make application therefor, pursuant to the forty-second

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This was an appeal from the judgment of the circuit court of Mason county, rendered on the 28th day of May, 1872, in a certain suit therein pending, wherein the Valley City Salt Company was plaintiff and Major Brown, Isaac Green and Mahala his wife, Joseph Hereford and Susannah his wife, Lydia Pumphrey, Virginia Pumphrey, Ella Pumphrey, Alice C. Pumphrey, — Ross and Cassandia his wife, Bazelel J. Pumphrey and Ann his wife, George W. Pumphrey in his own right and as executor of Nimrod Pumphrey and as trustee of Adaline Agnew, and Jane, wife of said George W. Pumphrey, Perry C. Purnell and Mary Ellen his wife, Daniel Polsley as executor of Nimrod Pumphrey and as trustee of Adaline Agnew, and Adaline Agnew, were defendants. The appeal was taken by Major Brown, one of the defendants.

The Hon. James W. Hoge, judge of the circuit court of said county, presided at the trial below.

The facts in the case, together with the constitutional provisions referred to, are sufficiently set forth in the opinion of Paull, Judge.

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ond chapter, to the circuit court of the county, and the proceedings thereon had shall conform to the said chapter."

"45. The report of the commissioners appointed pursuant to the said forty-second chapter to ascertain the just compensation to be paid for the property to be taken or injured for the purpose mentioned in the preceding section shall not be confirmed and ordered to be recorded by the court, unless from such report and the evidence in the case the court is of the opinion that the purpose for which the property is to be taken is of public utility, nor then, if it appear that the mansion house of any person, or the yard, garden or orchard pertaining thereto, or any mill, warehouse, factory, store or shop, railroad, canal, state or county road will be materially injured; and upon payment of the compensation so ascertained, within the time and the manner prescribed by the eighteenth section of the said chapter, a right of way only shall be vested in the applicant, not to exceed fifty feet wide in any case, except as to the land condemned for such place of deposit, sale and shipment (which shall in no case exceed one acre), as to which the title shall be absolutely vested in the applicant upon such payment. When the right is so vested in the applicant to cross any railroad, canal, state, county, or other road, he shall at his own expense, make and arrange the said crossing so as not to interrupt, or in any wise interfere with, the free use of such railroad, canal, state, county, or other road.

*Edward B. Knight and William H. Tomlinson*, for the appellant. 1874.  
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*J. W. English*, for the appellee.

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PAULL, JUDGE :

The Valley City Salt Company, the appellee and plaintiff below in this proceeding, is a corporation, organized under the laws of this State, for the purpose of digging or boring for salt and other minerals, and manufacturing the same ; and also for mining coal and marketing the same ; and for selling goods, having its principal office or place of business at Hartford City, in Mason county, West Virginia. The said company being the owner of a certain tract of land, containing thirty acres, and desiring to obtain access thereto by a subterranean right of way, by railroad, under a portion of an intervening tract, sought the benefit of the forty-fourth and forty-fifth sections of chapter forty-three of the Code of West Virginia. A petition was addressed to the circuit court of Mason county, setting forth the fact of ownership, and asking that commissioners might be appointed to ascertain what would be a just compensation to the owners of the land for what was sought to be taken in accordance with the provisions of law. The petition recites that the said right of way was "sought to be established by said company in order that it may mine and remove the coal from said tract of land, marked D., for the purpose of marketing the same, and of supplying the salt furnace of said company with coal, and for draining the rooms and entries which may be made in said lot D." To this petition Major Brown demurred ; commissioners were appointed, and made their report, to which the defendant Brown filed exceptions ; but the same were overruled by the court, and the report directed to be recorded on the chancery side of the court, the judge being satisfied that the purpose for which the property, in the petition mentioned, is to be taken, is of public util-

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ity; and it not appearing that the mansion house of any person, or the yard, garden or orchard pertaining thereto, or any mill, warehouse, factory, store, or shop, railroad, canal, State or county road will be materially injured by the taking of said property for said subterranean right of way.

Two of the exceptions, (the first and fifth) made to the report present the chief question raised by these proceedings for the consideration of the court, to-wit: Whether the applicants, the appellees here, are justified in invoking the right of eminent domain, residing in the State, for the accomplishment of their object. And to this question our attention will now be directed. The former Constitution of this State under which this cause originated, provided, as probably do the Constitutions of all the States of this Union, in article two section six, that "private property shall not be taken for public use without just compensation:" And that "no person, in time of peace, shall be deprived of life, liberty or property without due process of law." These provisions have been invoked by the defendant for his protection or the protection of his property. We observe in the outset that private property is there held subject to "public use" according to this provision of our civil compact, wherever the Legislature of the State in the exercise of its wisdom, shall see proper to wield the high and sovereign power of the government for this purpose. We observe, in the second place, that this constitutional limitation impliedly prohibits the taking of private property for any private use whatever, without the consent of the owner. This last proposition has been long supported in the legislative and judicial history of the country by the weight of authorities; but this question does not arise in the present case and is not intended to be decided at this time.

The remaining and material question then is, whether the land which has been taken, by the

proceedings in the present case is taken for <sup>1874.</sup> <sup>January Term.</sup> *public use*, as that use is found to appear in accordance with established legal principles; if so, the proceedings, (if there be no formal objection to them) are valid and if such use is not found to appear, they are void. We remark here, that the words "public utility" occurring in the forty-fifth section, must be regarded as synonymous, with the words "public use." We do not suppose that any different meaning was intended by the Legislature, but if there was, and there is really any difference in the signification, that attached to the language in the higher law, must prevail.

What then constitutes a public use, as contradistinguished from private use? The most extended research will not likely result in the discovery of any rule, or set of rules or principles, of certain and unusual application, by which this question can be determined in all cases. Eminent jurists and distinguished writers upon public law, do not express concurrent or uniform views upon this subject. It is a question, from its very nature, of great practical, perhaps of insuperable difficulty, to determine the degree of necessity, or the extent of public use, which justifies the exercise of this extraordinary power upon the part of a State, by which the citizen, without his will, is deprived of his property. For example; says Chancellor Walworth, in the case of *Beekman v. Saratoga and Schenectady Railroad Company*, in speaking of the *public interest*, "But if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the Legislature to determine whether the benefit to the public, will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals, for that purpose." An eminent commentator, judge Cooley, referring to this language, says, "It would not be entirely safe, however, to apply with much liberality, the language above quoted, that, 'when the public in-

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terest can be, in any way, promoted by the taking of private property,' the taking can be considered for a public use. It is certain that there are very many cases in which the property of some individual owners would likely be better employed, or occupied, to the advancement of the public interest, in other hands, than in their own; but it does not follow from this circumstance alone, that they may rightfully be dispossessed." And then follow some forcible and pertinent illustrations. Chief Justice Bigelow, in *Talbot v. Hudson*, 24 Monthly Law Reporter, says, "If land be taken for a fort, canal, or highway, it would clearly fall within the first class, (public use). If it was transferred from one person to another, or to several persons, for their own peculiar benefit or advantage, it would clearly come within the second class, (private use). There is no fixed rule, or standard, by which such cases can be tried and determined. Each must depend on its own peculiar circumstances." This, so far as our investigation has gone, is literally true, public writers, and the reported cases of numbers of the States furnishing us with no one certain and absolute standard of judgment. Says Justice McCurdy, in delivering the opinion of the Supreme Court of Connecticut, "one of the most common meanings of the word use, as defined by Webster, is 'usefulness, utility, advantage, productive of benefit.' Public use may, therefore, well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the State, under its right of eminent domain, for purposes of great advantage to the community, is a taking for public use." While this is in one sense true, it is yet perfectly obvious, that if the principle there announced is acted upon, without a most careful and guarded reference to the nature, necessity and extent of the use for which private property is sought to be taken, the great constitutional safeguard which has been thrown around it, will be utterly subverted.

It may now be further observed that it is not the nature of the agents or agencies which the state may employ for accomplishing a public use that determines, in any degree, its exercise of the right of eminent domain. These may be, either natural persons, or public or private corporations, organized for their own exclusive profit and emolument, *provided* there is connected with them a *public use* of such necessity or extent as will properly justify the interference of the state's sovereign power on their behalf. A railroad company, as well as any other, illustrates this truth, being simply a private corporation seeking the pecuniary benefit of its stockholders, while, nevertheless, vastly promoting the public interests, in the facilities afforded to the public for travel and transportation. Indeed the tendencies of our present organized form of society is to accomplish benefits and secure the public good, as far as practicable, through the means of private enterprize, activity and thrift; and this is seen in the provisions of our Code, now under consideration. The uniform history of the States, as connected with the exercise of this attribute of sovereignty, shows that it cannot be limited as to the agencies employed, either as to their nature, or the private purposes for which they are called into being. These agencies, whether corporate or otherwise, must have two-fold interests, both private and public; while the former alone may be regarded so far as the agency or corporation itself is concerned, yet when it is sought to clothe it with the right of eminent domain, the latter only can be regarded; here a direct purpose to benefit the public must be made to appear; and this in some direct and satisfactory form. It is manifest that not all agencies or corporations, though having a general tendency to promote the public interests, can invoke the exercise of this power of the state. For example, as long as the public must and will travel, hotels for its accommodation are useful, indeed essential and indispensable; so also printing or publishing companies, stage lines and other

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forms of industry are essential to the public good, but it will not be claimed that they are entitled, merely on that account, to the aid of the state, in the manner indicated. Again, it has been most strenuously argued that the term *public use* must be confined to its simple sense of *direct* possession, occupation and enjoyment by the public; but this principle, again, if inflexibly enforced, would, in many instances, probably defeat the most salutary exercise of the power.

In looking at the history of the states upon this subject, we find that the following objects embrace about all, perhaps every one, in whose behalf the states have interposed their sovereign power; to-wit: Public highways, turnpike roads, canals and railroads; also, for the purpose of erecting wharves, basins, streets and alleys; of establishing ferries, draining swamps and marshes: of bringing water to cities and villages; of erecting dams for the improvement of navigable streams, and the creation and protection of flouring mills. The legislation of other states has embraced these objects, and we think these only, so far as we have seen, down to the present time. While this course of legislation does not furnish an absolute law of exclusion at all, it does indicate that the enlightened judgment and wisdom of our legislative bodies has found no other objects of sufficient importance or necessity, to justify the exercise of this high power on the part of the states. In this connection we refer to an observation made by judge Cooley in his work on Con. Lim. 532: "The reason of the case, and the settled practice of free governments must be our guides in determining what is, or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare, which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them, otherwise, it is alike proper, useful and needful for the government to

provide." In looking at the class of objects above enumerated, we find that they are all of an undoubted, needful character; in other words there is connected with them all a clear *public use*; this element is indispensable: again, we find that in regard to them all, the government still maintains its power, and can so regulate and control the action of the agencies by which they are managed as to secure the rights and interests of the public therein; and if to these we shall add the impossibility or extreme difficulty, at least, of effectuating the same purposes in any other way, we may, perhaps, find in the combination of these three elements, a rule particular safe for our guidance in determining in any particular case, whether there has been a constitutional exercise of the right of eminent domain.

Before applying this rule to the case in hand, we refer again to said forty-fourth and forty-fifth sections of our Code: it will be observed that the right given in the forty-fourth section to certain parties to call in the aid of the State, is not absolute, but modified and controlled by the forty-fifth section, making it the express duty of the court to determine whether the purpose, in any particular application which is made, for which the property is to be taken, is of public utility or use; if not, all the proceedings must be rejected. It is not necessary, therefore, to pass here upon the constitutional character of the forty-fourth section, but simply to determine whether, under all the circumstances of this case, as seen in the report and evidence, a public use is legally found to appear; this it is made the express duty of the courts to determine in each case as it may arise.

In looking at the proceedings in this case, we find no light or information upon this point, in the report of the commissioners; the evidence introduces the certificate of incorporation, which recites the purposes of its organization, which have been hereinbefore set forth, to-wit: of digging and boring for salt, and other minerals, and making the same, and also for mining coal and market-

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ing the same ; and also for selling goods: the evidence further recites that the applicants were to sell their coal to the people living in and about the town of Hartford City, in Mason county; but at the same time, that said people could obtain their coal from other sources; that the public would not use the subterranean right of way, but the applicants only.

We are unable to see in this evidence and report of commissioners any of the requisitions of the rule: the work is not even needed to supply a limited neighborhood with coal; they can otherwise obtain their supplies; it is not extremely difficult, much less impossible, to do so; and there is no remaining supervision of law to regulate or secure any possible public interests. No sufficient public use is therefore made to appear to justify an interference with the rights of private property. To secure the possession and enjoyment of private property is one of the chief ends of all free governments; and hence the limitation found in our National and State Constitutions to secure this object and the safeguard thus provided in the supreme law, may not be lightly or recklessly invaded. To destroy or materially weaken its force, would be to subvert one of the pillars on which rests the fabric of our civil society. While cheerfully conceding that private interests must yield to the public exigencies, or the public good, in a proper case, yet that proper case must be clearly made to appear. Said a learned jurist of Virginia, judge Green, in 6 Randolph, "Liberty itself consists essentially, as well in the security of private property, as of the persons of individuals; and this security of private property is one of the primary objects of civil government, which our ancestors in passing our Constitution intended to secure to themselves and their posterity, effectually and forever."

An eminent statesman of England, referring to the security of the subject under the *Aegis* of English law, once said: "There stands the poor man's cottage; the

rains of summer and the snows of winter may enter its crevices, but the King of England with all his forces, dare not enter that poor man's cottage."

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In our own country the citizen should be equally safe in his person and property under the shield of our constitutions, and the acknowledged pre-eminent dominion of the state never needlessly employed to interfere with the private rights of the highest or the lowest in the land.

The judgment or order of the circuit court of Mason county, made on the 28th day of May, 1872, confirming the report of the commissioners and ordering it to be recorded, is set aside and reversed with costs to the appellant, and this Court proceeding to render such judgment as the court below ought to have rendered, doth adjudge and order that the petition of the appellee be and the same is hereby dismissed, with costs in the circuit court, and that this order be certified to the circuit court of Mason county.

The other Judges concurred.

JUDGMENT REVERSED AND PROCEEDING DISMISSED.

## CHARLESTON.

## POLSLEY &amp; SON v. ANDERSON.

February 25, 1874.

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| 7  | 308 |
| 86 | 7   |
| 86 | 157 |
| 7  | 202 |
| 86 | 083 |

P. & Son, attorneys, contract, in writing, with L. as follows: "It is agreed that P. & Son are to receive one hundred dollars certain and if the suit (referred to and mentioned in the agreement) is decided in favor of L. then P. & Son are to receive two hundred dollars, making three hundred in all."

P. & Son bring an action of assumpsit, setting forth the agreement and alleging that L. dismissed said suit without their consent and thereby hindered P. & Son from prosecuting said suit to a final decision, although plaintiffs were willing and ready so to do. The declaration also contains the common counts for work and labor, and upon an account stated.—HELD:

1. Upon a demurrer to the declaration, and to each count thereof, the same are sufficient.
2. That P. & Son are not necessarily entitled, upon issue joined on a plea of non-assumpsit, in addition to the \$100 certain, named in the contract, to recover the whole amount of the contingent fee therein specified; but for breach of said contract, by defendant, may recover such damages, by way of compensation for their time, labor and attention, as these are reasonably worth; as well, also, for any loss or injury they may have sustained; *provided* the whole recovery shall not exceed the entire amount stipulated in the contract.

An appeal from the judgment of the circuit court of Mason county rendered, upon the verdict of a jury, on the 30th day of May, 1871, in a suit at law, pending in said court, wherein Daniel Polsley and Daniel W. Polsley, partners in the practice of law, under the firm name of Polsley & Son were plaintiffs and Lewis Anderson, defendant.

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On the 23d day of December, 1870, the plaintiffs instituted an action of trespass on the case in assumpsit against the defendant and the writ was returnable to the January rules then next following. At these rules the plaintiff filed his declaration.

The *first count* alleged "that, whereas, heretofore, to-wit, on the 4th day of August, 1868, at the county aforesaid, the said defendant, in consideration that the said plaintiffs and William H. Tomlinson, Esq., at the special instance and request of said defendant, had then and there agreed with the said defendant that they and the said William H. Tomlinson, Esq., as attorney-at-law, would prosecute a suit in chancery, pending in the circuit court of Mason county, West Virginia, on the chancery side of said court, wherein the said defendant was plaintiff, and the heirs-at-law of John Anderson, dec'd, were defendants, for the enforcement of a special performance of a contract for fifty acres of land, entered into between the said John Anderson in his lifetime, and the defendant: He, the said defendant, then and there agreed that the said plaintiffs and the said William H. Tomlinson, Esq., should receive for their legal services one hundred dollars each, certain (meaning thereby that the said D. Polsley & Son should receive one hundred dollars, and the said Tomlinson one hundred dollars from the said defendant), and that if the said suit was decided in favor of the said Lewis Anderson, the defendant, that then the said Polsleys and Tomlinson were to receive from the said defendant three hundred dollars each (meaning thereby that the said D. Polsley & Son should receive three hundred dollars, and the said Tomlinson three hundred dollars from the said defendant), in all six hundred dollars. The plaintiffs now aver that in consideration of the said promise, agreement and undertaking, that they and the said Tomlinson, did commence and prosecute the said suit in said court, and that they did in all respects in that behalf fulfill and perform their part of said agreement in good faith; but that while

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said suit was pending in said court, and being diligently prosecuted by the said plaintiffs and the said Tomlinson; he, the said defendant, on his own motion, did, without the consent of the said plaintiffs, or said W. H. Tomlinson, cause the said suit to be dismissed, to-wit, on the — day of —, at the county aforesaid, and did then and there, by the dismissal aforesaid, hinder and prevent the said plaintiffs and the said Tomlinson from the further prosecution of the said suit, and did thereby prevent and render impossible a decision of said suit in favor of the said defendant. In consideration whereof the said defendant afterwards, to-wit, on the day last aforesaid, at the county aforesaid, undertook and faithfully promised the plaintiffs to pay them the aforesaid sum of \$300 on demand."

The *second count* alleged that "the said defendant was indebted to the plaintiffs in the further sum of \$300, with interest thereon from the 28th day of January, 1870, until paid, for the work and labor, care and diligence, and attendance of said plaintiffs as attorneys at law in the said court, before that time done, performed and bestowed by the said plaintiffs upon a retainer; at the special instance and request of the said defendant in and about the prosecuting and attending to a suit in equity in the circuit court of Mason county, West Virginia, for the said defendant against the heirs of John Anderson, deceased; and for certain fees due, and of right payable, to the said plaintiffs, in respect thereof. And being so indebted, the said defendant, in consideration thereof, afterwards, to-wit: on the day and year aforesaid, at the county aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay the said sums of money aforementioned whenever he would be thereunto afterwards requested."

The *third count* alleges that "the said defendant afterwards, to-wit: on the day and year last aforesaid, accounted with the plaintiffs of and concerning divers other sums of money from the said defendant to the said

plaintiffs before that time due and owing, and then in arrear and unpaid; and upon said accounting the said defendant was then and there found to be in arrear and indebted to the said plaintiffs in the further sum of \$300, and being so found in arrear and indebted, the said defendant in consideration thereof afterwards, to-wit: on the day and year last aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay them, the said plaintiffs, the said last mentioned sum of money when thereunto afterwards requested."

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The *fourth count* alleged that "for that whereas heretofore, to-wit: on the fourth day of August, 1868, at the county aforesaid, the plaintiffs and William H. Tomlinson Esq., entered into an agreement in writing with the said defendant, the date whereof is the day and year last aforesaid, and signed their names thereto, as did also the said defendant by J. L. Anderson, his duly authorized agent, by which agreement it was agreed and contracted by and between the said plaintiffs and Wm. H. Tomlinson, on the one part, and the said defendant on the other part, in substance as follows, to-wit: that the said plaintiffs and Tomlinson, as attorneys at law, should prosecute a suit in equity in the circuit court of Mason county, instituted by the said defendant against the heirs-in-law of John Anderson, deceased, for the specific performance of a contract for fifty acres of land entered into between the said defendant and the said John Anderson, in his lifetime; in consideration whereof, the said defendant agreed to pay the plaintiffs for their legal services in said suit the sum of \$100 certain; and if the said suit should be decided in favor of the said defendant, he, the said defendant, further promised and agreed in the written contract aforesaid to pay the plaintiffs for their services in said suit the sum of \$300, meaning and intending thereby that he, the said defendant, would, if the said suit should be decided in his favor, pay to the plaintiffs the aforesaid sum of \$300. And the plaintiffs, in fact, aver that they and the said Tomlinson did diligently and faithfully



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January Term. prosecute the said suit in said court from the date of said agreement up to the — day of —, and did bestow much labor, care and research in and about the prosecution of the same, and did in all respects, fulfill and perform their part of said agreement in good faith, and were at all times ready and willing and prepared to prosecute the said suit to a final decision; but that the said defendant, while said suit was being diligently and carefully prosecuted and managed by the said plaintiffs and Tomlinson in said court, and on his own motion, and without the consent of the said plaintiffs or either of them, caused the said suit to be dismissed from said court, to-wit: on the day and year last aforesaid, and did thereby hinder and prevent the said plaintiffs and Tomlinson from prosecuting said suit to a final decision in said court, and did thereby discharge the said plaintiffs and Tomlinson from all promised obligation or contract on their part to prosecute said suit to a final decision or decree in favor of said defendant; in consideration whereof the said defendant afterwards to-wit, on the day and year last aforesaid, at the county aforesaid, undertook and faithfully promised the plaintiffs to pay them on demand the last aforesaid sum of \$300, whereby an action hath accrued to the plaintiffs to have and demand from the defendant the last aforesaid sum of \$300.”

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The cause was matured at rules and came on the docket of said circuit court, where, on 22d day of February, 1871, the defendant appeared and demurred to the plaintiffs' declaration, and each count thereof, and plead to issue.

On the 28th day February, 1871, the court overruled the said demurrer.

On the 25th day of May, 1871, a jury was empanelled in the cause and “sworn the truth to speak upon the issue joined;” and on the following day rendered a verdict for the plaintiffs and assessed their damages at \$280. The defendant then moved to set aside this verdict, but at a subsequent day of the term, withdrew his motion,

and thereupon, the court rendered judgment on the verdict for the sum of \$280 aforesaid, with interest thereon from May 26th, 1871, and costs.

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On the trial of the cause the defendant tendered two several bills of exception.

The *first*, after incorporating therein the said article of agreement, as hereinafter set forth in the opinion of this Court, states that the construction the defendant contended for and asked the court to give was, "that before the plaintiffs were entitled to recover the contingent and increased fee, mentioned in said contract, that the plaintiffs were bound to prove that the suit was decided in favor of the said Lewis Anderson, and that proving that they had dismissed said suit, at the instance of said Lewis Anderson, was not, in law, equivalent to a decree in his favor, nor will the law imply that his dismissal of the suit was an implied waiver of that condition; which instruction the court refused to give, but, at the instance of the plaintiffs, gave to the jury *four* several instructions as follows:

"1. If the jury are satisfied from the evidence that the performance of the condition in the contract between the parties on the part of the plaintiffs in this suit was prosecuted by the defendant, the plaintiffs are entitled to recover the same that they would be if the condition had been performed.

2. That if they are satisfied from the evidence that the defendant, without the authority or consent of the plaintiffs, dismissed the suit mentioned in said contract, thereby preventing a decree in favor of the defendant, that the plaintiffs are entitled to recover the same amount that they would if the decree in favor of the defendant had been obtained.

3. That if the jury are satisfied from the evidence that the defendant, without the consent of the plaintiffs, compromised and dismissed his suit, the plaintiffs are entitled to recover the same amount that they would be if the condition on their part had been performed, and that in

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such case the plaintiffs cannot be held or required to prove but that for such compromise and dismissal they could have obtained a decree in favor of the defendant, and thereby performed the condition on their part.

4. If the jury believe from the evidence that the defendant agreed to pay the plaintiffs the sum of \$100 certain, for their services as attorneys in the prosecution of a suit for the defendant, and \$300 for their services in case said suit was decided in favor of the defendant, and if the jury further believe from the evidence that the plaintiffs did prosecute said suit until it was compromised and dismissed by defendant, and that said suit was compromised and dismissed by defendant, without the consent of plaintiffs, then the plaintiffs are entitled to recover the \$300 specified in the contract. To the giving said instructions, and each and every one of them, the defendant objected, which objection was overruled, and the instructions were given, and the defendants refused, and to the decision refusing said instructions and giving the instructions of the plaintiffs, the defendant excepts, which exceptions are signed, sealed and saved to him."

The *second* states that on the trial of this cause and after all the evidence on both sides had been given, instructions on both sides asked and passed upon by the court, the attorney for the defendant states that he had then for the first time discovered that F. W. Sisson, a practising attorney, and who was admitted to the bar, and qualified as an attorney in this court, at this time was in the jury, which was admitted by plaintiffs, that the discovery had just then been made, and asked that the said F. W. Sisson be discharged from the jury, and offered to proceed with the trial with the remaining eleven jurors, which proposition the plaintiffs declined, the defendant stating it was a surprise on him, and he would make it one of the grounds of a motion for a new trial if the juror was kept in the jury, which the court refused to do unless by consent of the other party, which consent was refused. The attorney for the said defen-

dant then asked the said F. W. Sisson to be sworn, which being done, the said F. W. Sisson stated that he heard some conversation about a previous suit on this same contract, and the defendant's counsel asked him if he had expressed any opinion as to the law of this case, and he said he had not. To which decision of the court refusing to remove the juror the defendant by his counsel excepts, which exceptions are signed, sealed, and saved to him."

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From the judgment aforesaid, the said Lewis Anderson appealed, in the mode and manner prescribed by law.

The Hon. James W. Hoge, judge of the circuit court of said Mason county, presided at the trial of said cause below.

*Henry J. Fisher*, for the appellant.

*Smith & Knight*, for the appellees.

PAULI., JUDGE:

An action of assumpsit was brought by the plaintiffs, D. Polsley & Son, who were attorneys at law, upon the following article of agreement, to-wit: "An article of agreement made and entered into between Lewis Anderson of the first part, D. Polsley & Son, and W. H. Tomlinson of the second part, *witnesseth*: That the said Lewis Anderson has instituted a suit in equity in the circuit court of Mason county for the specific performance of a contract for fifty acres of land, entered into between the said Lewis Anderson and John Anderson, in his lifetime; said suit is against the heirs of said John Anderson. Now, therefore, it is agreed that the said Polsleys and Tomlinson are to receive, for their legal services, one hundred dollars, each, certain, and if the said suit is decided in favor of the said Lewis Anderson, then the said Polsleys and Tomlinson are to receive from said Lewis Anderson, three hundred dollars, each, in all six hundred dollars." The declaration contains four counts; the first and fourth

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being substantially the same, set forth the contract or its substance, and after alleging that the plaintiffs commenced said suit, were diligently prosecuting the same, do further allege, that the said defendant, Lewis Anderson, caused said suit, without the consent of the plaintiffs to be dismissed from court, and did thereby hinder and prevent the said plaintiffs from prosecuting said suit to a final decision, in consideration whereof the said Anderson undertook and promised to pay said plaintiffs the said sum of \$300, &c. The second and third counts are the common counts for work and labor, care and diligence of the plaintiffs about the business or suit, of said defendant, and upon an account stated. A demurrer was entered to the declaration and to each count thereof: This demurrer was overruled by the court, and on the trial one instruction was asked by the appellant, Anderson, the defendant in the court below, to the effect, in substance, that the dismissal of the suit did not, necessarily, entitle the plaintiffs to the recovery of the contingent fee referred to in the contract, which instruction was refused. Four instructions were asked by the appellees, the plaintiffs in the suit below, (all in substance the same) to the effect that the plaintiffs having been prevented by the act of the defendant and without their consent, from performing the condition precedent contained in the contract, that then the plaintiffs were entitled to recover the same amount as they would have been, if the condition had been performed. These instructions were given by the court.

It is obvious that the chief question presented for our consideration, under the declaration and these instructions is this: What is the measure of recovery to which the plaintiffs were entitled? Such is the endless number and variety of subjects, and so manifold are the interests to which contracts are applied, while so many equitable considerations so often attend, either their failure or their execution, that it has been found exceedingly difficult, in practice, to establish any one rule which

shall be of uniform and universal application; in this view the question may not be regarded as wholly free from all difficulty.

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This is simply a case of an alleged violation of contract, without any oppression, fraud or malice calling for exemplary damages. In all this class of cases, it is the object of our English and American systems of law to give compensation to the party injured for the actual loss sustained. This compensation is furnished in the damages which are awarded according to established rules; and these rules form what is called the measure of damages. "It is a natural and legal principle," said Shippen, chief justice of the supreme court of Pennsylvania that the compensation should be equivalent to the injury." "The general rule of law," said Story, j., is this: "Whoever does an injury to another, is liable in damages to the extent of that injury. It matters not whether the injury is to the property or the person, or the rights, or the reputation of another."

But in forming a proper idea of legal compensation, it must be remembered that in cases of contract, as a general rule, the law regards only actual pecuniary loss directly sustained, disregarding indirect pecuniary loss, the value of time and expenses incurred in litigation, and taking no notice whatever of the motives of the defaulting party; that whether the engagement be broken through inability or design, the amount of remuneration is the same. Sedgewick on the Measure of Damages, 26, 27, 33 and 34. Wisely, therefore, the law has not attempted to secure what, (from the nature of the case) is impossible to men, a perfect rule of compensation. Speaking upon this subject chief justice Marshall says: "It would be going a great way to subject a debtor who promises to pay a debt, to *all the loss* consequent on his failure to fulfil his promise. The general policy of the law does not admit of such strictness; and although, in morals, a man may justly charge himself as the cause of

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any loss occasioned by the breach of his engagement, yet in the course of human affairs, such breaches are so often occasioned by events which were unforeseen, and could not easily be prevented, that interest is generally considered as compensation which must content the injured." *Short v. Skipwith*. 1 Brock., 103-114.

With the expression of these views of the nature and extent of compensation, which the law contemplates in furnishing a remedy for the breach of a contract, we observe, *secondly*, that as a general and important rule, the contract, itself, furnishes the measure of *damages*. "But this rule is also qualified, says Mr. Sedgwick in his work on damages, and when it is said that the contract furnishes the measure of damages, it is not thereby meant that the party, ready to perform his contract, will be able to recover of the party in default the entire price named in the agreement. On the contrary, it has been held, in many cases, that in actions for breach of contract, the measure of damages is not the price stipulated to be paid on full performance but the actual injury sustained in consequence of the defendant's default." The doctrine as thus stated is sustained and illustrated in the case of *Chamberlin v. McCallister* 6 Dana (Ky.) 352. It was there held that a plaintiff contracting to do work for a stipulated price and who is ready to perform his agreement, but is prevented by the other party, cannot recover the price named in the contract for the whole work, but only the actual damages sustained by him. Says chief justice Robertson, "if the conduct of the plaintiffs excused the defendants in error for their non completion of the entire job they had covenanted to perform, and entitled them to an action, still the proper and only legal criterion of recovery was, in our opinion, the actual damage they had sustained and not necessarily the whole price to which they would have been entitled, had they, without prevention or obstruction, plastered according to contract, the three houses."—"There is no reason for it; and, in our judgment there is no authority, which, when

rightly understood and applied, will sustain such a pre-tension. Did they sustain any damage? Then they were entitled to recover to the extent of that damage but to no greater extent." This was in 1838. Again in 1845, the supreme court of New York made the following decision in the case of *Clark v. Marsiglia*, to-wit: "The measure of damages against a party who has employed another to do certain mechanical work, at a price agreed upon and who has countermanded his directions and forbidden the further execution of the work, after it had been commenced, is not the whole amount agreed to be paid, but a just recompense for such injury as the party employed has sustained on account of the breach of the agreement. The party, so employed, has no right to proceed with the work after such countermand." The court say, "the plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court (below) erred: The defendant by requiring the plaintiff to stop work upon the painting, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages, as might, upon legal principles be assessed, for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it otherwise would have been." After some further illustrations of a pertinent character, the opinion concludes as follows: "In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith towards the employer." 1. Denio (N. Y.) 317. In the same volume in the case of *Wilson v. Martin* 602, and *Spencer v. Halstead* 606, the same doctrine is established. See also *Shannon v. Comstock* 21 Wendell (N. Y.) 457. The same doctrine is

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also held by the supreme court of appeals of Indiana in the case of *Jones v. Van Patten* 3 Ind. 107. In the foregoing cases the contracts were absolute for work and labor and specific sums agreed upon. The principle of these cases appears to be entirely applicable to the case now under consideration and applies possibly with greater force; for here the contract being conditional, it does not necessarily follow that the plaintiffs ever would have been able to have performed the condition, even if they had not been prevented by the act of the defendant.

In opposition to these principles, we are cited to the case of *Hill v. Cunningham*, 25 Texas, 31. In this case it was held that where an attorney contracted for a contingent fee to depend upon the result of the suit, and the client compromises the suit, without the consent of the attorney, he will be entitled to recover the whole amount of the fee in like manner as if the contingency had transpired upon which the payment of the fee was made to depend. The court, in this case, we observe, has simply and briefly expressed its opinion, without stating any grounds or reasons upon which the opinion is founded, and without reference to any authorities whatever; but does add, however, that the rule as thus announced cannot be without exceptions. In the case of *Hunt v. Test*, 8 Ala., N. S. 713, the same rule is announced by the supreme court of that state; but it is worthy of remark that the only question which seems to have been argued and considered by the court was whether a contract to solicit the passage of a private law by Congress was valid: and it was held that it was, and the party entitled to his stipulated compensation where the claim had been compromised. We are constrained to adhere to the general doctrine, as stated in the principles and authorities hereinbefore cited, as furnishing a safer and juster rule for measuring the recovery for the breach of such contracts.

In the light of these views and principles we think the court erred in giving the instructions asked for by

the plaintiffs, D. Polsley & Son, and did not err in refusing to give the instruction asked for by the defendant-Anderson, to-wit: that proving that they (the plaintiffs) had dismissed said suit, at the instance of the defendant Anderson was not, in law, equivalent to a decree in his favor. Nevertheless the plaintiffs are entitled to recover for the time, work, labor, care and attention bestowed by them, on the business or suit of the defendant, to the extent of their loss or injury, as established by legal rules. Can this recovery be had under the present declaration? It contains the common *quantum meruit* count; and it is said where the non-performance of the contract arises, not from any failure, on the part of the plaintiff, but from some act of the defendant, who absolutely refuses to perform or renders himself incapable of performing his share of the contract, the plaintiff may rescind the contract and sue at once on a *quantum meruit* for what he has done. This was decided in a case where the plaintiff had been engaged by the defendant to write a treatise on costumes and ancient armors, to be published in the Juvenile Library: When a certain progress had been made in the work the defendants abandoned the publication for which it was intended. The declaration contained a count for work and labor, upon which it was held that the plaintiff might recover upon the principle above stated. 8 Bingh. 14; Mayne on Damages, 155. But we think also that the *first* and *fourth* special counts which set forth the contract and aver the readiness of the plaintiffs to perform the condition precedent and their prevention of so doing by the act of the defendant, are sufficient to maintain the action. In the case of *Chamberlin v. McCalister*, 6 Dana (Ky.) before cited, justice Robertson says: "We are rather inclined to the opinion that though the offer and refusal, in such a case, should not be deemed equivalent to actual performance, according to contract, so far as the criterion of recovery might be concerned, yet as it would show a legal excuse for non-performance of a precedent condi-

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tion ; it might dispense with the averment of performance, which, otherwise would be necessary, in a declaration, and that thus an action might be maintained on the covenant ;" or, in this case, on the contract. These counts may be regarded as, properly, setting forth a legal cause of action upon the contract, the extent of the recovery to be controlled by the court, by its instructions, as if the same were upon a *quantum meruit*.

The judgment of the court, entered in this cause on the 30th day of May, 1871, is reversed with costs to the appellant, and the verdict of the jury set aside, and this cause is remanded to the circuit court of Mason county for a new trial in accordance with the principles hereinbefore expressed.

HAYMOND, President, and HOFFMAN, Judge, concurred.

MOORE, Judge, did not sit on the hearing of the cause.

JUDGMENT REVERSED, VERDICT OF JURY SET ASIDE,  
AND CAUSE REMANDED.

## CHARLESTON.

HENDERSON &amp; Co. v. ALDERSON.

February 25, 1874.

The fact that a deed was made, acknowledged and recorded during the war, does not render it null and void; there must be some special circumstances alleged to show, *prima facie*, the deed is null and void. 1874.  
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2. Where the record does not show when an amended bill or an answer is filed, yet if the decree shows the court proceeded to hear the cause upon the amended bill and answer, the appellate court will consider them properly filed.
3. It is irregular and error, for a court, upon motion of a person not a party to the suit, and the record not showing he has an interest in the subject matter of the suit, to order a commissioner to ascertain and report whether the consideration of a deed was Confederate money or good money; or whether the consideration of a deed was legal or illegal. And it would have been improper for the court, *ex mero motu*, to have made such an order, as the consideration for the deed had not been brought into issue by the pleadings.
4. A deed, even if the consideration was Confederate money, if within the scope of legitimate contract and not in aid of the rebellion, regularly acknowledged before, and recorded by a proper officer of the State Government, then under the power of the Confederate States' Government, is good.
5. A married woman having united with her husband, as grantor, in such a deed, is not entitled to dower in the land so conveyed.\*

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\*The following is section eight of chapter one hundred and eighty-six of the Code of Virginia, ed. 1860, referred to in the opinion of the court and also sections three and four, of the same chapter, referred to in said section eight:

"8. No judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice, unless it be docketed according to the third and fourth sections of this chapter, in the county or corporation wherein such real estate is, either within a year next after the date of such judgment, or ninety days before the conveyance of said estate to such purchaser."

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January Term.

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& Co.  
v.  
Alderson.

An appeal by Cyrus A. Rupert, Thomas A. Henning and J. G. Cox, Administrator of William G. Margrave from a decree of the circuit court of Greenbrier county, in a suit in chancery, pending in said court, wherein Henry H. Henderson & Co., were complainants, and Thomas G. Alderson, Eliza Patton, Zachariah Woodson and Sarah, his wife, Ammon Alderson, infant, Rufus Alderson, infant, Judson Alderson, infant, Charles Alderson, infant, Bettie N. Alderson, infant, John W. Dunn, Robert P. White, Wallace Robinson, sheriff of said Greenbrier county, and, as such administrator of J. G. Alderson, deceased, Maria J. Alderson, widow of said J. G. Alderson, John G. Cox, Administrator of William G. Margrave, deceased, Joel McPherson, Cyrus A. Rupert and Thomas A. Henning, were respondents. The decree was rendered on the 24th day of April, 1872, the Hon. Joseph M. McWhorter, judge of said circuit court, presiding at the hearing below. The other facts sufficiently appear in the opinion of the court, delivered by Moore, judge.

*Samuel Price*, for the appellants.

*Robert F. Dennis* and *James W. Davis*, for the appellees.

MOORE, JUDGE:

This cause is a sequel to the case of *Alderson's Heirs v. Henderson & Co.*, reported in 5 W. Va. 182; and reaches this court now, on an appeal taken by Thomas A.

"3. In the following section, the word "judgment" shall include any bond or recognizance which has the force of a judgment."

"4. The clerk of each county and corporation court shall keep in his office, in a well bound book, a judgment docket, in which he shall docket without delay any judgment in this State, when he shall be required to do so by any person interested, on such person's delivering him, if the judgment be not in his court or office, an authenticated abstract of it. In such docket there shall be stated in separate columns, the date and amount of the judgment, the date of docketing it, the alternative value of any specific property recovered by it, and the amount and date of any credits on the judgment, with the names, description and residence of the parties so far as they appear in his office or in such abstract. Every judgment shall, so soon as it is docketed be indexed in the name of each defendant therein. If a clerk fail to do any thing required of him by this section, he shall pay a fine of not less than thirty nor more than three hundred dollars to any person who will prosecute therefor."

Henning, C. A. Rupert and J. G. Cox, adm'r of Wm. G. Margrave, deceased, from a decree rendered by the circuit court of Greenbrier county, on the 24th day of April, 1872.

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v.  
Alderson.

It appears from the record of the case, as presented to the court on the former appeal, and from the opinion of the court as reported, that the interests of Henning, Rupert and the administrator Cox were not affected by the decree then appealed from, but the question, whether the land held by Rupert was liable to the plaintiffs' (Hendersons') judgment lien, was expressly reserved for future adjudication. All the questions, with that exception, now arising in this cause were adjudicated by the Supreme Court of Appeals upon the former appeal, and are therefore *res adjudicata*.

It appears from the amended bill, that J. G. Alderson, on the 28th day of April, 1862, executed a trust deed, upon a tract of land containing one hundred and fifty-eight acres, in Greenbrier county, to Joel McPherson as trustee, to secure a debt of \$500 and interest due to Wm. G. Margrave, which trust deed was recorded on the same day it was made; that on the 12th day of March, 1863, said Alderson conveyed, by deed of that date, this same land to Thomas A. Henning, recorded March 24th, 1863; and that said Henning conveyed the same land to Cyrus A. Rupert, by deed dated November 20, 1863, and recorded January 28, 1864.

The plaintiffs allege that "*these deeds are all null and void, as they were executed and recorded and acknowledged during the war.*" And they farther allege that their judgment, as set out in the original bill, is a lien upon this tract of land. The judgment obtained by the plaintiffs against Alderson, was rendered by the county court, March 25th, 1861. The judgment was never docketed, as required by statute to preserve the lien; and therefore the lien does not exist as against a purchaser of the land for valuable consideration, without notice. Code, 1860, Ch. 186, sec. 8, p. 771.

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The allegation that "these deeds are all null and void *as they were executed and vended and acknowledged during the war,*" is not such as is required by the rules of equity pleading; but is vague and indefinite. The allegation should be positive and direct, and not merely inferential.

The mere fact that a deed was made, acknowledged and recorded during the war, does not render it null and void; there must be some special circumstances alleged, so as to show *prima facie* that the deed is null and void, and thus enable the defendants to respond specifically.

The record does not show when the amended bill and the answer of Henning, Rupert and Cox were filed; and in fact it does not show at what time some of the decrees were entered. But as the circuit court proceeded to farther hear the cause on the 14th day of January, 1869, without objection, on the said amended bill and answer, as appears from the decree of that date, the appellate court will consider them properly filed.

The said defendants, in their answer, "*deny that they had any notice of such judgment when they respectively purchased, paid the purchase money, which they allege they have long since done, and obtained their deeds, respectively, as set forth in the bill.*" They also deny the plaintiffs' right to subject the land to the payment of the judgment.

At the June term of the circuit court, 1869, "*on motion of the administrator de bonis non of T. B. Patton, deceased,*" the court ordered special commissioner Mathews "*to ascertain and report whether the consideration of the deed from Joseph G. Alderson to Thomas A. Henning was Confederate money or good money; and whether the consideration of the deed from Thomas A. Henning to Cyrus A. Rupert was legal or illegal,*" &c.

The record does not disclose what interest, or any interest, the administrator of T. B. Patton, deceased, or

Patton, himself, may have in the subject; nor does said administrator appear to have been in any way a party to the suit. It certainly was irregular for the court to have entertained such a motion when made by a person unknown on the record as a party.

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Alderson.

Nor would it have been proper for the court, *ex mero motu*, to have made the order, as the consideration for the deeds had not been brought into issue by the pleadings.

The commissioner, acting upon that order, made his report, not upon "*positive proof*," but as he says, "*in the absence of any positive proof, the Confederate presumption—that is, the presumption from the date of the transaction, and the currency in circulation at the time, that Confederate money was intended—attaches.*" Upon that hypothesis he reports that the consideration of both deeds was Confederate money. The record does not show whether the court acted upon the commissioner's report or not; but on the 24th day of April, 1872, the court, by decree, declared the deeds to Henning to Rupert, and the trust deed, void, as to creditors, and directed the land to be sold for the payment of the debts of Alderson. The decree does not state the grounds upon which the court declared the deeds void. There is nothing in the pleadings, nothing in the proof of the cause that tends, in the slightest degree to impeach the deeds. Even if the consideration had been for Confederate money, if within the scope of legitimate contract and not in aid of the rebellion, and although the deeds were acknowledged before and recorded by proper officers of the state government then under the power of the Confederate government, as claimed in argument, the principles decided by this court in the cases of *Harrison's Ex'or. v. Farmers' Bank of Virginia*, 6 W. Va., 1, and *Henning v. Fisher*, Ibid. 238, are conclusive of these questions, and the deeds must be held, not null and void, but good and sufficient. Therefore I am of opinion that the decree of the circuit court, so far as it declares the deeds void and directs the one



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hundred and fifty-eight acres of land to be sold, should be reversed.

And it appearing also from the record that the defendant, Maria J. Alderson, united with her late husband, the said J. G. Alderson, in making and acknowledging the deed to Henning, she is not entitled to dower in the said one hundred and fifty-eight acres, and the decree of said circuit court, rendered January 14th, 1869, so far as it directs the assignment of dower to her in the said one hundred and fifty-eight acres is erroneous and should be reversed, with costs.

The other Judges concurred.

DECREES REVERSED.

## CHARLESTON.

## MCMILLAN v. FERRELL.

February 25, 1874.

1. Notwithstanding the act of the Legislature approved the 21st day of December, 1872, entitled "an act regulating appeals, writs of error and *supersedeas*," does not allow an appeal from an order of a judge of a circuit court granting an injunction, an appeal from such an order, pending in the Supreme Court of Appeals of this State, on the 31st day of December, 1872, and the first day of January, 1873, and not heretofore decided, is still pending in this Court and it still has power and jurisdiction to hear and determine the same upon its merits or otherwise, as may be proper, under the provisions of the twelfth, seventeenth and twenty-first sections of the Schedule to the Constitution of this State, and the act of the Legislature, approved January, 11, 1863, entitled "An act organizing the Supreme Court of Appeals, defining its jurisdiction and powers, and prescribing its manner of proceeding," and especially under the provisions of the fourth section of the latter act.

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| 53 | 222 |

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| 57 | 220 |

2. An injunction is not granted to restrain a mere trespass to real property, when the bill does not, on its face, clearly aver good title in the plaintiff; nor, even then, as a general rule, (though perhaps not universal) where the injury complained of is not destructive of the substance of the inheritance of that which gives it its chief value, or is not irreparable, but is susceptible of complete pecuniary compensation and for which the party may obtain adequate satisfaction, in the ordinary course of law.

An appeal from an order of the Hon. George Loomis, then judge of the ninth judicial circuit, as organized by the act passed July 17th, 1868, dated May 10th, 1871, awarding an injunction, in vacation, to Jordan McMillan, the complainant in the bill, against William Ferrell and Benjamin H. Smith, the respondents.

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The bill, after alleging that the complainant received a conveyance from one McFarland for eight thousand acres of land in Roane county, this State; that on the 16th day of August, 1870, the jury in a certain action of ejectment then pending in the circuit court of said Roane county, wherein complainant was plaintiff and certain persons hereinafter named in the opinion of this Court, were defendants, "found the defendants not guilty," and for the plaintiff, "the residue of said eight thousand acres, described in the declaration, and not being conveyed prior to the conveyance of said McFarland to plaintiff," and filing a copy of said verdict, as an exhibit, charges that one Ferrell, son of respondent Ferrell, who, "although he was one of the defendants to said ejectment suit, claimed no interest whatever, and occupied no part of the land thereafter described in said bill," "that the said son pretends since said judgment that he has bought of respondent Smith four hundred acres, part of said eight thousand acres," "that said four hundred acres were never conveyed to said respondent Smith, or to any one else whose interests were adverse to those of complainant;" and that "the said four hundred acres were found to be complainant's by the verdict of the jury and judgment of the court thereon" aforesaid.

The bill then charges that the said son has forcibly wrested possession of said four hundred acres from complainant, describes the same, and asserts, as grounds for the interposition of the restraining powers of a court of equity, that "he has fenced in thirty acres of said four hundred;" "has cut and is cutting and destroying both within and without his enclosure large quantities of the most valuable timber thereon;"—"is committing waste thereon," that "a good deal of timber is now lying on the ground where said Ferrell felled it,"—that "complainant has sold said land and is being greatly injured by the acts aforesaid;" that "neither Ferrell or Smith have a shadow of title to said land," and concludes with the usual prayer, in such cases.

The injunction thus awarded, was duly perfected. and proper process duly issued and served upon the respondents. From the order awarding said injunction, and without having answered the said bill, the respondents took this appeal.

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*Benjamin H. Smith* for the appellants.

*Okey Johnson* for the appellee.

HAYMOND, PRESIDENT:

Plaintiff presented his bill to the Hon. George Loomis, then judge of the ninth judicial circuit, as organized by the act of July 17, 1868, though the same was addressed to the Hon. Robert S. Brown, then judge of the circuit court of Roane county, praying that defendants, and each of them, and their agents, be enjoined from clearing, cutting timber upon or trespassing on the land in the bill mentioned; and, also, from removing from the land the timber that they or either of them, have cut, or caused to be cut thereon. And on the 10th day of May, 1871, judge Loomis granted the injunction, as prayed for, to take effect on the plaintiffs filing bond, with good security, in the penalty of five hundred dollars, conditioned according to law. Afterwards, on the 16th day of May, 1871, the plaintiff filed his bill of injunction, in the clerk's office of Roane county, gave the required bond with security, and caused a summons with the restraining order endorsed thereon, to be duly issued upon the bill, against the defendants, returnable to the first Monday in June thereafter. The summons was duly executed upon the defendants and returned. From the order of the judge granting the injunction the defendants to the bill appealed to the Supreme Court of Appeals, as they then lawfully might; and the case was pending in the Supreme Court of Appeals, on the first day of January, 1873. The appeal was perfected on the — day of May, 1871.

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Perrell.

The plaintiff insists that the appeal should now be dismissed, because it was taken under the provisions of the Code of this State, of 1868, chapter one hundred and thirty-five, section one, which provided for an appeal from an order granting an injunction, and the Legislature by an act approved December 21, 1873, entitled "An act regulating appeals, writs of error and *superseas*," repealed the act allowing appeals from orders granting injunctions. It will be seen by reference to the seventeenth section of the Schedule to the Constitution of this State, adopted by the voters, and which took effect on the 22nd day of August, 1872, that it is therein expressly provided that "the records, books, papers, seals and other property and appurtenances of the existing Supreme Court of Appeals, shall, on the first day of January, 1873, or as soon thereafter as may be, be transferred to, and remain in the care and custody of the Supreme Court of Appeals established by this Constitution, until otherwise provided by law; and all civil or criminal causes, petitions and other proceedings then pending in the Supreme Court of Appeals, shall be proceeded with by the Supreme Court of Appeals established by this Constitution, to final judgment." By the twelfth section of the Schedule, it is provided that the Judges of the Supreme Court of Appeals existing at the adoption of the Constitution, should continue in office until the 1st day of January, 1873. The twenty-first section of the Schedule provides, that "All the courts of justice now existing shall continue with their present jurisdiction, and be held as now prescribed by law, until the judicial system established by this Constitution shall go into effect; and all rights, prosecutions, actions, claims and contracts shall remain and continue as if this Constitution had not been adopted, except so far as the same may be affected by the terms and provisions of this Constitution, when it shall go into effect." By the twelfth section of the Schedule it is also provided that the terms of office of the Judges of the Supreme Court

of Appeals, of the judges of the circuit courts, and of all county and district officers, whose election is provided for by this Schedule, shall commence on the 1st day of January, 1873. Although the Constitution, for many purposes took effect on the 22d day of August, 1872, still the permanent judicial system established by the Constitution did not fully take until the term of office of the judges thereunder commenced, which was on the 1st day of January, 1873. By the act of the Legislature approved January 11, 1873, entitled, "An act organizing the Supreme Court of Appeals, defining its jurisdiction and powers, and prescribing its manner of proceeding," and especially in the fourth section thereof, it is provided, that all suits and proceedings which shall be pending in the present Supreme Court of Appeals on the 31st day of December, 1872, shall be proceeded in and determined by the Supreme Court of Appeals, the Judges of which were elected on the 22d day of August, 1872. The act of December 21, 1872, did not take effect till the 31st day of December after its passage, and does not, in any of its provisions pretend, expressly, to in any wise affect appeals, &c., then pending in the Supreme Court of Appeals, or in any wise to modify or alter the provisions of the Schedule, touching such appeals, &c., before referred to. And the said act of 11th of January, 1873, in addition to the provisions of the Schedule, provides that such causes, &c., shall be continued and determined by this Court. This cause was pending in the Supreme Court of Appeals, on the 31st day of December, 1872, and on the 1st day of January, 1873, and under the provisions of the Schedule and statute, it became the duty of this Court to hear and determine it. Notwithstanding, by the provisions of the act of 21st of December, 1872, appeals cannot be taken to this Court from orders of judges of the circuit courts granting injunctions, appeals pending on the 31st day of December, 1872, in the Supreme Court of Appeals, regularly taken and perfected, were, and are, not affected, by the said act,

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and were not intended to be thereby affected, in the least. The plaintiff's motion to dismiss this appeal must, for these reasons, be overruled.

I now proceed to consider this cause upon its merits. The plaintiff, in his bill, alleges, substantially, that he received, in 1868, a conveyance for eight thousand acres of land in Roane county from one McFarland; that in August, 1870, the jury, in an action of ejectment, then pending in the circuit court of Roane county, wherein he was plaintiff and William Ferrell, and William John Hall, John Sarver, Marshall Clarkson, John W. Webb, Isaac Post and Marshall Depue, were defendants, found the said defendants not guilty, and found for the plaintiff, the residue of the eight thousand acres, described in the declaration, and not being conveyed, prior to the conveyance of McFarland to plaintiff that the court entered judgment on the verdict; that he (plaintiff) charges that since the rendering of said verdict, and judgment, William Ferrell, one of the defendants, to the action of ejectment, who claimed no interest whatever, and occupied no part of the land in said declaration described pretends, that since the judgment aforesaid, he has bought four hundred acres of said eight thousand acres, from B. H. Smith; that the four hundred acres were never conveyed at any time to said B. H. Smith, or to any one else whose interests therein are adverse to the claim of plaintiff; that the four hundred acres are a part of the eight thousand acres aforesaid, and was found to be his by the verdict of the jury, and judgment of the court that he (plaintiff) charges that said William Ferrell ha forcibly wrested the possession of the said four hundred acres, which lies in the north-east corner of the eight thousand acres, on Hays' Fork of Henry's Fork of the West Fork of the Little Kanawha river, from plaintiff; that Ferrell has fenced in about thirty acres of said land and has cut, and is on said four hundred acres, cutting and destroying, both within and without said enclosure, large quantities of the most valuable timber

thereon, and is committing waste thereon; that a quantity of the said timber is now lying on the ground, where Ferrell felled it; that plaintiff has sold the land, and is being greatly injured by the said acts of Ferrell; that neither Ferrell or B. H. Smith, have a shadow of title to said tract of land. These are all the material allegations of the bill upon which the prayer for the injunction is predicated, and upon those allegations alone, supported by the usual affidavit of their truth, the order of the judge granting the injunction, must stand or fall. The plaintiff does not expressly aver title in himself, at any time, to the land. His charges against Ferrell amount to nothing more than a common trespass, and he makes no charges whatever against Smith. He does not allege the insolvency of Ferrell, or Smith, or show upon the face of the bill, in any manner that he has not a complete remedy at law, for obtaining redress or compensation for the alleged trespass, or that he will sustain irreparable damages, unless equity interposes, and restrains and prohibits further trespassing upon the land. And he, in fact, expressly avers that he has sold the land.

By the mere reading of the bill, it is manifest that it fails to allege or aver sufficient material elements or facts necessary to entitle plaintiff to invoke the interposition and aid, of a court of equity by process of injunction, or otherwise. "The objection to the injunction, in cases of private trespass, except under very special circumstances, is, that it would be productive of private inconvenience, by drawing cases of ordinary trespass within the cognizance of equity and by calling forth, upon all occasions, its power to punish by attachment, fine and imprisonment, for a further commission of trespass, instead of the more gentle common law remedy by action and the assessment of damages by a jury. In ordinary cases, this latter remedy has been found amply sufficient for the protection of property; and it has not been thought advisable, upon any principle of justice or

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policy, to introduce the chancery remedy, as its substitute, except in strong and aggravated instances of trespass, which go to the destruction of the inheritance, or where the mischief is remediless. This appears to be the English doctrine, and the practice of courts of equity in most of the States of the Union. It would be difficult to find a case in which an injunction has been held properly granted to restrain a trespasser, merely because he was a trespasser, without showing that the property itself was a peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. In ordinary cases the damages to be assessed by a jury, will be adequate for a check, and for a recompense, especially if the trespasser is not insolvent." See opinion of judge Kent in *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; *Stevens v. Beekman*, 1, Id., 318.

In the case of *Anderson v. Harvey's heirs*, 10 Gratt. 398; judge Daniel in delivering the opinion of the court says: "I think it is clear that, at the time of the alleged trespass on the ore bank, by the appellant, the appellees must be regarded as in possession of it, with a clear and incontestible title, they might have instituted their action of trespass against the appellant; but were not bound to do so before or instead of applying to a court of equity to restrain the appellant from committing further trespasses on the property in dispute. Were they bound to litigate and discuss, in a court of law, rights, which had not only been adjudicated as far back as 1807, but which had been solemnly recognized in the conveyances to which the appellant must necessarily refer as the sources of any title which he could assert? I think not. The practice of courts of equity of interfering in such cases by way of injunction, is one comparatively of recent origin, but the jurisdiction is now fully recognized and well established by cases both in England and America. *Mitchell v. Dors*, 6 Ves. (Jr.) Ch. 147; *Hanson v. Gardiner*, 7 Ves. (Jr.) Ch. 306; *Thomas v. Oakley*, 18 Ves. (Jr.) Ch. 184; 3 Daniel

Ch. Prac., 1852-3; *Stevens v. Beekman*, 1 Johns. Ch. (N. Y.), 318; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.), 315; *Smith v. Pettengill*, 15 Vermont, 84. The land upon which the trespass is alleged to be committed is proved to be of little or no value, except for the iron ore found on it, which is found to be of an excellent quality. The trespass is one which goes to the change of the very substance of the inheritance, to the destruction of all that gives value to it. The fact proved by the appellant, that the value of the ore per load could be readily estimated, does not deprive a court of equity of its right to interfere in the case by way of injunction. The same might be shown in most cases of the kind. The products of most mines have a value already fixed or of easy ascertainment by proof; yet it was in prevention of like trespasses to this very species of property, mines of ore, coal, &c., that the jurisdiction in question had its origin, and still continues to be most frequently exercised." The case last cited is not similar to that now under consideration. On principle I am clear that the matters and things stated in plaintiff's bill, are not sufficient, admitting them to be true, to warrant the granting of the injunction awarded in this case.

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For these reasons, the order of the judge, in granting the injunction in this cause, and dated the 10th day of May, 1871, must be reversed and annulled, and the appellants recover their costs in this Court expended. And the plaintiff's bill must be dismissed.

The other Judges concurred.

INJUNCTION DISSOLVED AND BILL DISMISSED.

## CHARLESTON.

## OCHELTREE v. McCLUNG.

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1. In Virginia, though the feoffment—including livery of seisin—and deeds of lease and release, and the covenant to stand seised to a use, were sometimes used; the deed of bargain and sale was the ordinary conveyance of land that prevailed before the Code of 1849 took effect in 1850.
2. Any valuable consideration, however small, is sufficient to support this conveyance; and the acknowledgment in the deed, of the payment, is conclusive of the fact, so far as to give effect to the conveyance.
3. The deed of bargain and sale was, and is, adequate to vest an estate in fee in land, in one person, and afterwards, upon a contingency, to divest it out of him and vest it in another person, though the latter was not ascertained or in existence at the date of the deed. But such shifting and revesting of an estate must be limited to take effect, if at all, within the time prescribed to prevent the creation of perpetuities.
4. This deed may be employed to convey an estate and reserve or confer a power of appointment, upon the execution of which the deed will vest the estate in the appointee. In such case, the appointment is the event upon which the declaration in the deed operates to create the use, and, under the statute on the subject, to transfer the estate to the appointee.
5. Such deed might be employed by a woman in contemplation of marriage, with the consent of the intended husband, effectually to convey and limit the legal estate in land to a trustee in fee; in trust for herself till the marriage; and to allow the husband to occupy the land till the death of the one of them who should first die; and, if she should survive, then to convey to her; but if she should die, the husband surviving, then to such person as the wife notwithstanding the coverture, might, by last will, published in the presence of three witnesses, appoint; and in default of such appointment, the estate in the trustee to terminate—so as to revert to her heirs.

6. The prevailing intent in each deed, properly manifest, will control its effect, as to whether the estate vested in the immediate bargainee, either for his own benefit or in trust, is a fee determinable, which, on the happening of the contingency or execution of the appointment, determines in him and shifts to another, or reverts to the bargainor; or, on the other hand, the legal estate in the trustee is a fee absolute and remains in him, while a mere equitable interest is limited to an ultimate beneficiary.
7. An appointment is the event upon which the limitation in a deed takes effect and vests the estate, legal or equitable, in the appointee. In itself it has no operative efficacy.
8. When the deed specifies an appointment by will, with sanctions not legally required in a will, the probate of the instrument, before the year 1850, does not furnish evidence that it was executed with additional sanctions.
9. Though persons who have no joint or common claim to land, but only separate claims, may be named as plaintiffs, jointly in one count as well as severally in others, they need not be named jointly, but may severally complain and count.
10. When one plaintiff, in his own name alone, complains, gives the notice and proceeds in the case, but counts separately in his own name and the name of another, alleging right in each, but not stating that the land described in each count is the same, the count in his own name is good, and the other may be treated as surplusage.
11. When several instructions are asked and refused, and a general exception is taken to the refusal, if all the instructions are proper and should have been given, the exception is sufficient and the judgment will be reversed.

This was an appeal, by Joseph M. Ocheltree, from a judgment of the circuit court of Greenbrier county rendered on the 7th day of October, 1871, in an action of ejectment therein pending, wherein the said Ocheltree was plaintiff, and Cyrus McClung, Samuel K. McClung, Alpheus P. McClung, Frank McClung and James Rader, infant, and Calvin Rader, infant, heirs at law of Charles McClung, deceased, and Nancy McClung, widow of said Charles McClung, were defendants.

So much of the pleadings in the cause, the evidence adduced at the trial and the orders and rulings of the court below, as are deemed material to understand the

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principles discussed and decided by this Court, are set forth in the opinion delivered by Hoffman, Judge.

The Hon. Joseph M. McWhorter, judge of said circuit court, presided at the trial below.

*William W. Gordon*, of Virginia, and *Adam C. Snyder* for the appellant.

*Samuel Price* and *Robert F. Dennis* for the appellees.

HOFFMAN, JUDGE:

In England, at common law, a feoffment—including livery of seisin—was the ordinary conveyance used to transfer an estate in fee, vested in possession, in land, from the holder, in his lifetime, to another not already having an estate or interest in the land, or possession of it. This conveyance was effectual to vest a fee simple, or a fee limited to continue till the happening of a contingent event and thereupon of itself to determine; or a fee conditioned so as, upon a contingency to be, by the entry of the feoffor or his heirs, determinable; and, in either case, such qualified or conditional fee to revert to the feoffor or his heirs. But the feoffment was not adequate, upon such determination of an estate in fee, either with or without entry, to vest the estate in a stranger; or, without a previous estate, to vest an estate *in futuro* in any person. For centuries after lands became alienable—until after the passage of the statute of uses—estates in fee could not, by any conveyance *inter vivos*, be limited so as, upon a contingency, to divest out of one taker and vest in another, or, certainly, on a contingency, to commence *in futuro*. In Virginia, I believe, the feoffment was the only conveyance not statutory in its operation, that was used to transfer an estate in fee. But, for many years this has been but seldom, if at all employed.

In England, the fine and the common recovery were made to serve the purpose of most effectual transfer and assurance of title. But in Virginia they were never adopted.

A grant was proper to transfer an incorporeal hereditament, or a reversion or vested remainder, in land. But, in England before 1845, and in Virginia before 1850, a grant was not effectual to transfer an estate in fee in land in possession.

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A release was, and is, appropriate to vest an estate or right of one person, in another person already having an estate less than a fee simple in land, or having possession with claim of title. Though, since the year 1850, a deed of release may have more extensive application.

At common law, a power retained by a feoffor or grantor, or conferred by him on any one, after the feoffment or grant, to appoint an estate to another, was unknown.

In England, the deed of bargain and sale was sometimes used, but not so generally as other conveyances and assurances. It was, I believe, for the most part, if not entirely, limited, to the simple transfer of an estate to take effect *in presenti*, to a bargainee *in esse* and ascertained. Under the act of Parliament requiring enrollment, it was less convenient to the parties than the deed of lease and release. In Virginia, this deed was used not only for the conveyance of a fee absolute, qualified, or conditional, immediately from the bargainor to the actual bargainee for his own benefit; but for the limitation and creation of different estates in successive or substituted takers, and for the conveyance to trustees for the benefit of others. At any rate, the deeds usually employed for such purposes contained words of bargain and sale, while, as other species of conveyance, they were entirely inappropriate, or wanting in essential requisites to their validity. As deeds of bargain and sale they vested the estates as intended—or they failed to vest them at all.

In Virginia, moreover, this species of deed was employed to convey land, and, at the same time, to reserve or confer a power to revoke an estate thereby transferred to one person, and to appoint it to another or to others, successively or by substitution—or rather when

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the appointment should be made, thereupon to vest the estate: And, under the statute of uses, enacted to give effect to conveyances, from such a deed containing a reservation or grant of power, and an accordant appointment, a limitation over upon the appointment acquired whatever efficacy it had to transfer and vest the legal title to and in the appointee.

In England, under the statute of uses, the deed of lease and release, was generally used, not only to transfer a fee from one person to another for his own benefit, but to vest the estate in a trustee, and declare any uses, present or future, certain or contingent, which it was intended should, by the pervasive efficacy of the statute, be transmuted into legal estates. In Virginia these deeds were never much used. Whether, under the operation of the limited statute of uses in force, they were effectual to transfer the estate to any person other than the lessee, need not now be considered.

A covenant to stand seised to a use, as a conveyance, required a consideration of blood or marriage between the covenantor and the person to take the title. Such a consideration would not support a deed by a covenantor, so as to vest the title in a trustee not by blood or marriage related to him, for the benefit of his wife, child or other relation. This conveyance was not often employed.

Since, then, deeds of bargain and sale have been employed to effect the transfer and accomplish the settlement of most of our estates and rights in lands, a brief reference to their origin and nature, and an inquiry as to their operation and effect under the statute from which they receive their efficacy as conveyances, may be interesting and important.

At an early day, in contemplation of a court of equity, a feoffment or other conveyance of land might be accompanied by a declaration that the use of the land should, at once or subsequently, certainly or upon a con-

dition, inure to a third person, in fee simple or determinable with or without entry, and revert to the feoffor or his heirs; or that, upon a contingency, the use should shift from one to another beneficiary; or that the feoffor or trustee might appoint the use, or revoke and appoint it; and, thereupon it should inure to the benefit of the appointee: Or, upon the payment of a valuable consideration, a bargain might be made by the holder of land, with a bargaineer, to sell it; and a use would thereby be created. By the court of equity, the holder would be coerced, according to the trust, to allow the beneficiary to enjoy the land, or to convey it to him.

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The statute of uses was devised and enacted to apply to such equitable rights, and transform them into legal estates.

The most important provision of the English statute of uses, passed in 1536—37, Hen. VIII, ch. 10—(found in Cruise's Digest, p. 348,) relieved of dispensable verbiage, is in substance as follows:

When any person shall be seised of lands, to the use, confidence or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life or for years, shall thenceforth stand and be seised or possessed of the land, of and in the like estate as he or it had in the use, trust and confidence; and the estate of the person so seised to the use shall be deemed to be in him that has the use, in such quality, manner, form and condition, as he had before in the use.

The Virginia provision to give effect to deeds without livery of seisin or actual transmutation of possession, which passed in 1785, and took effect in 1787—(ch. 62, 12 Hen. Stat., 157,)—extracted from a section containing many distinct provisions—is as follows:

“By deed of bargain and sale, or by deeds of lease and release, or covenant to stand seised to use, or deed operating by way of covenant to stand seised to use, the possession of the bargainor, releasor, or covenantor shall be deemed heretofore to have been, and here-



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after to be, transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person hath or shall have in the use, as perfectly as if such bargainee, releasee, or person entitled to the use had been enfeoffed with livery of seisin of the land intended to be conveyed by such deed or covenant."

This provision has been at different times re-enacted, and, as a separate section, it yet remains in force. It is the only statute of uses that was ever enacted in Virginia.

Under the English law, when the holder of land, by feoffment, or other conveyance that by its own vigor transmits the estate, conveys land to one person for the use of another, or any number of persons successively, to be enjoyed presently or *in futuro*, absolutely or contingently, upon the expiration or in derogation of a previous use; the conveyance, with the declaration of use, by force of the statute, at once, or, if upon a contingency, then, whenever the beneficiary is in existence and ascertained and the contingent event happens, accomplishes the transfer of the estate, through the feoffee to the one or successive or substituted beneficiaries. When, however, the feoffor conveys to one person in fee, for the use of a second person, in trust for a third, the estate is transferred through the feoffee to, and vested in the immediate, but not in the ulterior beneficiary; and the former will hold the estate in trust for the latter. But, nevertheless, the feoffor may provide that a use in fee shall, upon the happening of an uncertain event, be determined; when it will revert to the feoffor or his heirs; or that upon such event, it shall shift from one beneficiary to another: Or the feoffor may reserve, or confer on the feoffee or a third person, a power to appoint or revoke and re-appoint the use: And, in either case, by force of the statute, the legal estate will be shifted and vested accordingly.

Different opinions have been entertained and enforced

by able and distinguished lawyers and judges, as to where, during the continuance of the actual estate vested in the first taker in fee, the estate is lodged, which upon a contingency will vest in the secondary taker, and as to when it emanates from the feoffee, and how it reaches the final beneficiary. By many, it has been held, that though the estate has passed through the feoffee and vested in the first actual taker, nevertheless a *scintilla juris*, or possibility of seisin remains in the feoffee, and, when the secondary use arises, passes from him to the taker of that use and developes into an estate in the latter. While by others—as I understand the purport of the proposition asserted—it is maintained that by force of the feoffment and consequent seisin in the feoffee and attendant declaration of uses, under the statute, the entire estate at once passes through the feoffee and vests in the first actual taker in fee, with condition that on the happening of the contingency, or the occurrence of the event upon which it is provided the use shall shift, the estate in the first taker terminates and, without indispensable seisin at the time in the feoffee, vests in the secondary taker. After much subtile and ingenious disquisition on the subject, modern jurists of very high authority incline to the latter opinion. But this branch of the subject is metaphysical to a degree such as well nigh to elude the most careful effort to consider or discuss it. It is not, however, material or desirable, here, to do more than refer to these different opinions.

When a person, by deed, in consideration of any thing valuable, bargains and sells land to another, though at the common law the legal estate is not affected, but a mere equitable use is created; by force of the statute the legal estate is transferred to the bargainee. Any such consideration, however small, is sufficient to support the conveyance. And the acknowledgment in the deed, that the consideration is paid, is conclusive of the fact, so far as to give effect to the conveyance.

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Under the English law, by the deed of bargain and sale, the estate may be transferred to the bargainee, in trust for the benefit of another ; and the bargainee will, as trustee, take and hold the estate, or be required to dispose of it for the benefit of such other. By reason of the consideration and the bargain, he is deemed to acquire a use, and, under the statute, he takes the estate ; but by the provision in the deed he holds it upon the actual trust for the beneficiary.

It seems to me, that an immediate bargainee may pay the consideration for himself and any other person or successive persons, absolutely or contingently, whether ascertained or *in esse*, or not, and, upon such consideration, a use may be declared for the benefit of such persons when they are, or if they ever be, in existence and ascertained ; and, by operation of the English statute, the use will be transmuted into a legal estate : And that, as upon a feoffment, when the legal estate passes through the feoffee to a beneficiary in whom it vests, subject to a provision that on the subsequent happening of an uncertain event, the use shall shift to another ; on the happening of that event the estate divests out of the previous taker and vests in the substituted beneficiary : So, upon a bargain and sale, when a legal estate passes directly to a bargainee, for his own benefit or in trust for the equitable benefit of other persons, with a provision, that upon the happening of a future contingency the estate shall shift to another ; upon the happening of the contingency, the use and estate will determine in the bargainee, in whom it first vested, and vest in the other as provided : And that when the bargain and sale is accompanied by a reservation or creation of a power in the bargainor or another to revoke the use—or, in terms as well as effect, to determine the estate in the first taker and appoint it to another ; when the appointment is made, the estate likewise divests out of the former holder, whether for his own benefit or as trustee for others, and vests in the appointee. I cannot see that, under the

statute, the one or the other transaction is the more or less effectual to accomplish the purpose indicated. If, when the conveyance is by feoffment, and the estate vested in the feoffee is transferred from him to the first beneficial taker, and, on the happening of a contingency or the execution of an appointment, is determined in and divested out of such taker, it passes again from the feoffee to the substituted taker; so, when the conveyance is by bargain and sale and the estate is transferred to the bargainee for his own benefit or as a trustee for the benefit of others, and on the happening of a contingency or execution of an appointment is determined and divested, it may, as well, pass from the bargainor. If, in the former case, the estate passes directly from the previous holder to the new taker, so in the latter case supposed, it may pass directly from the previous holder to the new taker.

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If the controversy still continue, as to whether, after an estate has passed through a feoffee and vested in an actual taker in fee determinable, a *scintilla juris* yet remains in the feoffee; perhaps there may be a question as to whether, after an estate has passed from a bargainor to a bargainee and vested in him in fee determinable, a particle of estate remains in the bargainor, which, when the use shifts, if the seisin of the bargainor or first taker continues—but not otherwise—passes to the secondary beneficiary and enlarges and vests in him as a complete estate: Or, on the other hand, by force of the deed and seisin of the bargainor at the time of its execution, when the use shifts—without necessary seisin at that time either in the bargainor or in the first taker—the estate determines in the latter and passes directly to the second beneficiary. But it is not important here to discuss this question.

If, in the Virginia statute, the word “bargainee” applies to a person, whether ascertained or not, for whose contingent benefit a consideration is paid and bargain

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Ocheltree to a beneficiary in a deed of bargain and sale as to the  
v. beneficiary in a covenant to stand seised to a use—as in  
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then, under this statute, the deed of bargain and sale,  
with a provision, upon a contingency, to shift the estate  
from one taker under it to another, will operate to effect  
such object.

Soon after the enactment of the English statute, the primary purpose to convert all equitable uses into legal estates was frustrated, to a great extent, by the decision that a use declared to one person for the use of or in trust for another, would become a legal estate only in the former and remain an equitable right in the latter. However, the system of conveyances to which the statute gave origin and imparted efficacy, was, not only in England but in this country, generally—indeed almost exclusively—established. These conveyances were much more convenient than the feoffment with livery, and more convenient and less expensive than the fine or common recovery ; and, as has already been indicated, they were the only conveyances by which a springing or shifting estate could be created, or a power of revocation and appointment could be reserved or conferred. At the time of the action of the General Assembly of Virginia on this subject, no disposition to adopt so much of the English statute as had become practically inoperative, or to modify it so as to make it accomplish its original object, appears to have prevailed. But, certainly, the purpose merely to provide for a bargain and sale and lease and release, to transfer an estate to the actual bargainee, or lessee and releasee, and a covenant to stand seised to the use of a wife or near relative, and to have no law for the limitation of a springing or shifting estate to another not *in esse* and ascertained, cannot be supposed to have inspired the legislation in question. On the contrary, the intention to adopt so much of the English statute as gave effect to the conveyances then generally

in use, and, in the absence of others alike efficacious, indispensable to the necessities and convenience of society, was most natural and reasonable; and the language employed is entirely appropriate and sufficient to express such intention.

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Sir Edward Sugden inclines to the opinion that, under the English statute, a consideration paid by an immediate bargainee, will not sustain a contingent use to a person not *in esse*. Gilb. on Uses and Trusts by Sugden, top page, 23-4, note; p. 78—top page, 163.

Professor Lomax doubts as to the English and Virginia law on the subject; but seems rather to think that by deed of bargain and sale a contingent remainder can not be limited to a person not *in esse*; and that a springing or shifting estate can not be limited to any person. 1 Lom. Dig., 188-9, 443-7; 2 *Id.*, 128-9, 135-6.

The court of appeals of Virginia has decided a number of cases involving these questions. *Whiting v. Rust*, 1 Gratt., 483; *Shearman's Admr. v. Hicks*, 14 Gratt., 96; *Jones v. Tatum*, 19 Gratt., 720. But that court has never discussed the subject in a manner at all satisfactory. It has sometimes assumed the efficacy of a deed, under the statute, to vest a contingent remainder or springing or shifting use; but has not uniformly done so.

In 1857, Judge Samuels delivering the opinion of the court, in *Shearman's Admr. v. Hicks*, said:

"It must be conceded that Timberlake had the right (if he had chosen to exercise it) to convey the estate by deed of bargain and sale to Shearman for life, remainder to Mrs. Shearman in fee, determinable upon an event occurring at her death or before, and if so determined, then over to another in fee. See 1 Rev. Code, p. 369, 370. This right results from the power of the bargainor, either to declare the use at once and finally, or to reserve to himself a power to revoke the use and to declare other and different uses; so he may confer upon another the power possessed by him. In either case, the law against perpetuities must be respected. The ap-

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Ocheltree Sugd. Pow., 25 ; 2 Lomax's Dig., § 23, new edition."  
v. 14 Gratt., 99, 100.  
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But as late as 1870, Judge Moncure, in *Jones v. Tatum*, said :

"Whether the trustees should be parties to the suit depends upon whether they had any legal title to the land. And that question depends upon another, which is, whether, by our statute of uses, the legal title was transferred from them to the children of Anna D. Tatum, the plaintiffs and defendants in this suit, at the time of her death in October, 1865, or at the time of her husband, Theophilus Tatum's, death in November, 1865. Certainly such title would have been so transferred by the operation of the English statute of uses. 1 Lomax's Dig., pp. 194, 195, marg. There seems to be a material difference between the English statute of uses and ours; and it may be doubtful whether our statute would have that effect. *Id.* and *seq.*; *Bass v. Scott*, 2 Leigh, 356. Our statute has not yet been judicially construed, except that in the case just cited, it was considered as not extending to a devise."—19 Gratt., 732-3.

The learned Judge, however, having made this suggestion, dismisses the subject, and proceeds to the statement of other matters, upon which the case is decided.

Two provisions, and perhaps others, adopted at the revision in 1819, and incorporated in the chapter on conveyances, (1 R. C., ch. 99, secs. 25, 26,) indicate the legislative purpose or understanding on this subject. They are these :

"Every estate in lands, which shall be limited by any deed hereafter made, or by the will of any person who shall hereafter die, so that, as the law was on the 7th day of October, 1776, such an estate would have been an estate tail, shall be deemed to be an estate in fee simple ; \* \* \* and every limitation upon such an estate, shall be held valid, if the same would be valid

when limited on an estate in fee simple created by technical language.”

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“Hereafter an estate of freehold or of inheritance shall be made to commence *in futuro*, by deed, in like manner as by will.”

These provisions, by necessary implication, either recognize or provide that a deed of bargain and sale or a deed of grant was or should be effectual to create the springing and shifting estates mentioned and contemplated: But in this respect their import or effect—as far as I am informed—has not, by any court or jurist, been decided or suggested.

The first of these provisions likewise implies, that by a proper deed an estate may be limited in fee so qualified or conditioned, as on a contingency to determine, and without any limitation over, to revert. The estate vested in the first taker must cease to exist in him before it can vest in another; and, if by the deed properly construed, it so determines, and there is no limitation over, then, by operation of law, the estate reverts to and vests in the bargainor or his heirs.

In this connection, the provision re-enacted in the chapter on conveyances, immediately after those already quoted, dispensing with the necessity of words of inheritance to create a fee, perhaps, should be noticed. 1 R. C. ch. 99, sec. 27. It is as follows:

“Every estate in lands, which shall hereafter be granted, conveyed, or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised, by construction or operation of law.”

It may be remarked, that in one of the provisions before quoted, there is reference to “an estate limited upon a fee simple.”—The limitation of a fee absolute to one person and an estate over to another is a contradiction. A fee qualified or conditional, or a less estate, is neces-



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sarily implied in a limitation over. In both these sections it is plain that the phrase "an estate in fee simple" is intended to mean, a fee inheritable—either absolute or qualified. Though a classification of estates by which a fee simple and fee absolute are treated as synonymous and each is distinguished from a fee in any manner determinable, may be, and I apprehend is more, accurate, and therefore preferable; yet there is authority for the use of the phrase "fee simple," to include not only a fee absolute but a fee qualified or conditional. 4 Kent's Com., 3; 1 Lom. Dig., 17. Under the operation of the statute of uses, I suppose there is little, if any, difference between a fee qualified and a fee conditional or any other fee determinable. However this may be, it can not be supposed, that by a chapter in which the creation of qualified fees is fully recognized, it is intended to adopt a rule of construction that would preclude their creation. Under the provision in question, though words of inheritance are no longer necessary to the creation of a fee, nevertheless, by language that limits or by reasonable construction indicates a fee qualified or conditional, or in any manner determinable upon a future event, such fee may be limited, as well as a fee absolute or a less estate.

After some research and much reflection and deliberation, for the reason suggested and others arising in the law and policy of the subject, notwithstanding the high authority to the contrary, I have formed the opinion, that the owner of land in Virginia, might, before the code took effect in 1850, or may now, by deed of bargain and sale, upon a valuable consideration however small, paid by the immediate bargainee, or acknowledged to be paid, convey, limit and vest the legal estate to and in such bargainee, in fee, either for his own benefit or for the benefit of others, and, by the same deed, on the happening of a contingent event, divest the estate out of such bargainee and vest it in another person; whether at the time of the execution of the deed the latter is ascertained or in existence, or not: Or, the owner of the land may, by the deed, re-

serve to himself, or confer on the bargainee, trustee or other person, a power to revoke and appoint the estate, and provide that upon such revocation and appointment the estate shall vest in the appointee: And in the former case, upon the happening of the contingency, and in the latter, upon the proper execution of the appointment. according to the provision in the deed, the estate—legal as well as equitable—will vest in the party named or described in the deed or appointment: Or the owner may, by the deed, provide that upon a contingency or the failure to appoint, the estate shall determine in the immediate bargainee for his own benefit or in trust, without declaring its further destination: And in the latter case the estate will revert to the bargainor or his heirs.

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The time, however, within which the contingency must happen or the appointment take effect, must not reach beyond the limit prescribed by the policy of the law to prevent perpetuities.

In Virginia a woman might, and in this State she may, in contemplation of marriage, by deed of bargain and sale in which the intended husband joins, convey land to a person in fee, in trust for the bargainor till the marriage, and thereafter to permit the husband to occupy and enjoy the land during the joint lives, and if, during the coverture she shall by deed or will appoint it to another and die, then the estate to determine in the trustee and vest in the appointee; or if, without appointment made by her by deed, the husband shall die and she shall survive him, then the estate in the trustee to determine; or if, without appointment by deed or will, she shall die in the lifetime of the husband, then, at her death the estate in the trustee to determine: And if she properly appoint the estate, it will accorndigly vest; but if not, then on the husband's death in her lifetime, the estate will revert to her; or at her death in his lifetime, it will revert to her heirs.

The prevailing intent in each deed, properly manifest, controls its construction and effect, as to whether the es-

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tate vested in the immediate bargainee for his own benefit or upon trusts declared, is a fee determinable, and, on the happening of the contingency or execution of the appointment, the legal estate determines in him and shifts to another, or reverts to the bargainor ; or, on the other hand, the legal estate vested in the trustee is a fee absolute, and remains in him, while a mere equitable interest declared in favor of an ulterior contingent beneficiary or an appointee, vests in the latter.

The propositions I have stated are general. To what qualifications or exceptions they may be subject, I do not now pause to consider.

Under the English law—as it is taught and received—upon a feoffment to a trustee in fee, with a declaration of a use in fee to one person, and provision for a voluntary appointment by the feoffor or trustee to another person to whom upon its execution the use shall shift—as has already been suggested—the appointment is the condition upon which by the operation of the original deed, under the statute, the estate determinable in the previous taker, in fact determines, and vests in the appointee. If, under the English or Virginia law, a deed of bargain and sale is sufficient, upon any contingency, to shift a use—as I have expressed the opinion that it is—such a deed with a declaration or provision that upon an appointment, the estate shall shift, operates in the same way; except that the estate does not pass through a feoffee. In either case, the feoffment and the declaration of uses, or the deed, creates the estate, immediately or ulterior. The appointment in itself has no vitality. It merely constitutes the event and designates the person on which and in whom the estate vests. It is but the occasion specified in the deed, upon which one or more of its limitations are to take effect. However refined, or even fictitious, this theory may be, I do not perceive any other by which the law, as recognized, on this subject, can accomplish the object intended.

As, generally, a condition on which an estate is to vest or determine, or to divest out of one holder or taker and vest in another, should be performed or happen with reasonable strictness or certainty, so an appointment upon which an estate is to be shifted from one to another, should, with reference to the provision in the instrument by which it is prescribed, be executed with at least ordinary, if not more than ordinary accuracy. When the deed disposing of the subject, prescribes the form and mode of the appointment, that form and mode must be observed. Though in equity, in some cases, a defective execution will be sustained.

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A will is a disposition by a competent person, of his own estate, interest, or right, to take effect at his death. An appointment is an act done by one person upon which an antecedent provisional disposition of the property of another is to take effect in the lifetime or at the death of the appointor. An appointment, in its nature, is never a will. By the operation of a will, an estate passes from the testator to the devisee. Upon an appointment, nothing passes from the appointor to the appointee; but, in case of a bargain and sale, by the operation of the deed under which the appointment is made, the estate passes from the bargainor, or an immediate bargainee for his own benefit or in trust, and vests in the appointee.

When a deed provides that, upon an appointment by will simply, an estate shall shift from one to another, it indicates that the instrument to constitute the appointment shall be framed and executed and be revocable, and perhaps be proved, as a will; though, as it seems, it is sometimes required to be further proved as an appointment. At any rate, when the deed specifies that an appointment by will, with other formalities and sanctions not legally pertaining to a will, shall constitute the event on which the limitation over shall take effect, it requires the observance and substantive proof of these ad-

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ditional requisites, as imperatively as if, without mentioning a will, the deed had enumerated the legal requisites of such an instrument, and superadded the formalities and sanctions mentioned. In such a case, when the requisites include the formalities of a will, with others, manifestly the paper designated is not a mere will. It requires more than a will in the manner of its execution, while it is less than a will, or at any rate different from a will, as to the mode of its effect.

Different courts in Virginia had jurisdiction to take proof of wills and grant certificates thereof. But no court had authority, by a proceeding *in rem*, to take proof and determine the sufficient execution and effect of papers, whether called wills or not, intended to operate as appointments and required to be executed, not merely as wills, but with different or additional formalities or sanctions. Generally—perhaps universally—the record of the proper court of probate that a will was proved, is conclusive that the paper acted on is the will of the testator, and as such is effectual to dispose of his estate. But it proves no more. It certainly does not prove a pretense, whether true or false, that the paper was executed in a manner not by law prescribed for the execution of a will, but by a previous deed required as a condition on which a limitation in the deed is to take effect. What efficacy or tendency the probate may have, to establish the fact that a paper purporting to be an appointment by will was proved to have been executed in the manner in which, legally, a will was required to be executed, need not now be considered. The authority at hand seems to indicate, that while proof in the court having jurisdiction of the probate of wills, would be indispensable; yet, in another court, renewed proof would be required, to give efficacy to a limitation to take effect on the appointment. However that may be, it is self-evident that proof before the court of probate that the paper is a will, or in the form of a will, is not sufficient to give effect to the provisions of a deed de-

pendent on the execution of an appointment requiring solemnities not required in a will. If the limitation were itself by will, so that upon the execution of the appointment the disposition would take effect as a devise, it might be more plausibly, and perhaps more forcibly argued, that the record of probate would be conclusive as to the execution of the appointment—the condition precedent to the efficacy of the will. But when the limitation is by deed, the requisites of the appointment—at least when not essential to the validity of a will—must be proved by evidence other than the recital by a court of probate, that the paper was proved to be a will, and an order to record it as such. When the paper purports to be an appointment under a deed, whether the probate treats the paper as a will, or as an appointment in the form of a will, is not material here. In either case, the inquiry of the court of probate does not range beyond the requisites of a will.

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As far as authorities are at hand, they sustain the conclusion that deliberate consideration establishes.

Mr. Sumner, in his edition of Mr. Vesey Jr's., Reports (Vol., 1, p. 49,) appends to the report of the case of *Fettiplace v. Gorges*, a note of points and authorities on this subject, an extract from which is as follows :

"It is to be observed that where the power has been given to married women to appoint the use of land *by will*, without more, the will must be intended such a one as is proper for the disposition of land; and, consequently must be subscribed by three witnesses, in the presence of the testator. For, whether such an instrument be, strictly speaking, a will, or only in the nature of a will, it is within all the inconveniences which the statute of frauds intended to prevent. *Longford v. Eyre*, 1 P., Wms., 740; *Duff v. Dalzell*, 1 Brown Ch., 147. However, under special reservation to that effect, a donor of a power affecting real estate, may, it seems well execute the same by a will not attested according to the provisions of the statute of frauds. *Bath and Montague's case*,

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3 Ch., Ca., 69. For, though no man can reserve to himself a power of disposing of his own real estate by will not executed according to the statute, (*Goodill v. Brigham*, 1 B. and P., 198; *Habergham v. Vincent*, 2 Ves. (Jun.), Ch., 226,) yet, a power given to another to charge the real estate of the donor of the power by the will of the donee, may admit execution by a will attested by two witnesses only; the charge, in such case being in fact imposed by the instrument creating the power, not by the will, which merely directs the appropriation of that which the owner has, previously, by deed *inter vivos*, put beyond his own control. *Jones v. Clough*, 2 Ves. (Sen.,) Ch. 365. It is clear, however, that it is only a charge upon lands which can be called into operation by testamentary instrument not executed according to the provisions of the statute.

"It has been intimated, that it has been matter of controversy, whether a disposition of property duly made by a *feme covert*, and to take place after her death, be or be not, in technical strictness, a will; or whether it ought only to be termed an instrument in writing. *Duke Marlborough v. Lord Godolphin*, 2 Ves., (Sen.,) Ch., 75; *Southby v. Stonehouse*, 2 Ves., (Sen.,) Ch., 612; *Oke v. Heath*, 1 Ves., (Sen.,) Ch., 139. The solution of this critical nicety, supposing the question still to remain *in dubio*, may, perhaps, seem not very imperiously called for; since it is allowed, on all hands, that such a writing if not a proper will, is at any rate of a testamentary nature; that so far as it relates to the personal property, it must receive probate from the ecclesiastical court; *Ross v. Ewer*, 3 Atk. 160; *Cothay v. Sydenham*, 2 Brown Ch., 392; *Stevens v. Baywell*, 15 Ves., (Jr.,) Ch., 153; and that the court of chancery will then give it all the operation of a will: *Cotter v. Laye*, 2 P. Wms., 623; *Henley v. Philips*, 2 Atk., 48: with this qualification, however, that where the testamentary paper is to operate as the execution of a power, there, although the judgment of the ecclesiastical court is necessary to declare such instrument to be

in the nature of a will, yet the court of chancery afterwards examines the circumstances of attestation and signature, according to its own rules of evidence; and does not trust the ecclesiastical court with the conclusion that, because the writing is testamentary, it must, in equity, be deemed a good appointment. *Rich v. Cockell*, 9. Ves., (Jr.,) Ch. 376, 381. The general rule of the court of chancery (subject to modification whenever a case plainly calls for it,) is never to establish a will without an examination of all the witnesses thereto. *Bottle v. Blundell*, 19 Ves., (Jr.,) Ch., 500. See note 1 to *Lord Carrington v. Payne*, 5 Ves. (Jr.,) Ch., 404. In *Hurst v. Morgan*, Forester's Ms., the case was this; a *feme covert*, under a power duly reserved to her to limit the use of an estate by deed or will, or writing in nature of a will, during her coverture, devised the estate to her son and heir in fee, charged with her debts, and died shortly after her son died, a minor; and important question arose, whether the son took by appointment only under the power, and as a purchaser; or whether he took by descent, which it was held he must have done if the instrument were taken to be a will; as the devise, being to the heir at law of the testatrix, would have been void, or at least operate only so far as to let the heir in to take his preferable title. Upon this point depends the question, whether the estate should devolve upon his heirs *ex parte paterna*, or his heirs, *ex parte materna*. Lord Hardwicke said, it was clear that the testatrix, as *feme covert*, could not make a will, and that her instrument could only take effect as an appointment under the power. It had been insisted on by counsel, that if not a will, the instrument must have all the qualities of a will; but his Lordship said, it was very true it must have all such qualities as arise from the testamentary form of the instrument, such as being liable to revocation, or lapse; but it could take effect only as an appointment, more especially as relating to real estate, raising a question triable at law, where the instrument must have been

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pleaded, not as a will, but as an appointment; and the limitation, therein contained, considered as if it had been inserted in the original deed which created the power. As that deed operated by transmutation of possession, (being a conveyance by lease and release,) Lord Hardwicke was of opinion, that the estate of the appointee proceeded out of the estate of the releasees, and vested in the son as a purchaser; consequently, that it must go to his heirs *ex parte materna*."

It will be remembered that the settlement of personal property to the separate use of a married woman; without express power, conferred on her, as incident to her interest, the right to dispose of her property: And, likewise, that the English ecclesiastical court had exclusive jurisdiction of the probate of wills of personalty—the only wills formerly requiring a sentence of probate. In this state of the law, the cases of *Rich v. Cockell* and *Rich v. Hull*, (9 Ves., Jr., Ch. 369,) were heard and decided. In these cases, it appears that personal property was bequeathed to a trustee for the separate use of a married woman as she should appoint. She, by her will, bequeathed a part of it to the plaintiff, and died; and the will was proved in the ecclesiastical court.

In this case, Lord Eldon said:

"As at the time the legacy was given, it was for the separate use of the wife, and it continued so, until transferred to the husband, that transfer could not destroy the separate trust, unless clear evidence is produced by the husband, that it was intended with her assent to destroy it. If the evidence is short of that, as it is perfectly settled that a husband may in this court be a trustee for the separate use of his wife, he would precisely be in the same situation as to the beneficial interest as the person who made the transfer. There he is a trustee.

"The wife then had vested in her such powers as the nature of the property, or the terms of the instrument, had given, or would give her. In this case the in-

strument has only expressed a trust for her separate use ; not determining as to the power of disposition, whether by deed, will or other writiug. But the nature of that interest is now well settled : that, the trust being for her separate use, she would be enable to dispose by will, if she thought proper, as incident to such an interest, though a will was not alluded to. That is settled clearly in *Fettiplace v. Gorges*. Her power to dispose by will is therefore clear. She might have a power to dispose by an instrument, not amounting to a will ; in this court supported as a direction or appointment. It is not necessary to determine, whether, if she sets about a disposition by will, meaning to make a testamentary instrument, that is a good disposition. But it is necessary to consider another question, merely for the forms of the court, and without reference to the merits. I continue to think the proof wanting in this cause. Where a *feme covert* had the power by will, according to the terms of the instrument requiring witnesses to dispose of personal estate, it was necessary to prove : *First*, that the instrument is in the nature of a will : *Second*, if so, that it was attested *eo modo*, in which the power required it to be attested. For the former purpose, it has hitherto been deemed necessary, that this court should be satisfied by the judgment of the ecclesiastical court, that the instrument is in the nature of a will. But this court has never been contented with that judgment, as to the circumstances of attestation ; for after that proof in the ecclesiastical court, this court always requires the witnesses to be examined, in order to prove, that it is her act, and will not trust the ecclesiastical court, with this conclusion ; that, because it is her act, and in nature testamentary, therefore this court is of necessity to hold it an appointment. Though in the terms of the power, as well as from the nature of the power, the attestation of witnesses is not necessary ; still the question here is, whether it is her direction or appointment. Upon the point, whether her signature is to be proved here, I

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think it ought; and I do not see the distinction, upon which, if in the case I put, the attestation must be proved, the court will not also require the fact of signature to be proved again, where the essence of the appointment consists in that fact."

Professor Lomax, in his work on Executors, (p. 349,) says:

"Where the will of a married woman has been made in execution of a power, probate of it in the court of probate is first necessary, in order to confirm, judicially, its testamentary character. But the production of such a probate will not alone be sufficient to induce a court of equity to act upon it, for there may be other special circumstances required to give the instrument effect as a valid appointment, viz: attestation, sealing, &c. The witnesses, therefore, to these facts, must be examined in chief, to prove that the will was the wife's act, &c., and though an attestation be not required by the power, still her signature must be proved." He cites *Rich v. Cockell*, 9 Ves. (Jr.) Ch. 376; 2 Ross Prop. 192.

In what I have said, I have referred to the law as it was before the year 1850, without reference to the very just, expedient and important legislation on this subject incorporated in the Code which in that year took effect.

The chapter of the Code of Virginia of 1849, relative to the action of ejectment, copied with slight modifications into the Code of this State, was intended to introduce a form of pleading and proceeding practically convenient, but in one respect, as far as I remember, without a precedent in any other action. (Code ch. 90 secs. 10, 23 and 29.) The provisions referred to are as follows:

"The declaration may contain several counts, and several parties may be named as plaintiffs, jointly in one count and separately in others."

"If the jury be of opinion for the plaintiffs or any of them, the verdict shall be for them or such of them as appear to have the right to the possession."

"The judgment for the plaintiff shall be according to the verdict, if there be a verdict; or if the judgment be by default or on demurrer, according to the description in the declaration."

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Though persons have no joint or common claim to land, yet, according to these provisions, they may join in the same action of ejectment, and either may severally recover. They may jointly complain and severally count, or, without a joint complaint, may severally complain and count. The law does not, in terms, require that in such a case there shall be a joint count as well as several counts; and when there is no joint claim there is no good reason for such a count.

When one plaintiff, in his own name alone, complains, gives the notice and proceeds in the case, but counts separately in his own name and in the name of another, alleging right in each, but not stating that the land described in each count is the same, the count in his own name is good, and the others may be treated as surplusage.

When several instructions are asked and refused, and a general exception is taken to the refusal, if all the instructions are proper and should have been given, the exception is sufficient, and the judgment, when it appears to be erroneous, will be reversed.

The material facts shown by the record of the case in judgment, are these:

In the year 1837, by deed between Thomas McClintic of the first part, Eliza Maze of the second part, and Jonathan Maze of the third part, all of the county of Greenbrier, it was recited that a marriage was intended to be shortly celebrated between McClintic and Miss Maze, the parties first named; that she owned considerable real and personal estate—which was described—and that it had been agreed that he should, after the marriage, receive and enjoy, during their joint lives, the in-

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terest and occupation of the estate; and that the property and the interest and profits, after the decease of the one of them who should first die, should be at the sole disposal of the wife, notwithstanding the coverture.

And the deed reciting, that in pursuance of the agreement, and in consideration of one dollar paid, Miss Maze, with the consent and agreement of McClintic, testified by his sealing and delivering the deed, granted, bargained, sold and assigned to Maze, the property described; to have and to hold it to him, his executors, administrators and assigns; upon such trust, nevertheless, and for such intent and purposes and under such provisions and agreements, as thereafter mentioned—that is to say, in trust for Miss Maze and her assigns until the solemnization of the marriage, and, thereafter, upon trust that Maze should permit the husband, during the joint lives of the husband and wife, to occupy the estate and have, receive and enjoy it for his own use and benefit, and from and after the decease of the one of them who should first die, then upon trust that Maze should assign and pay over all the estate to her; but that if the wife should die before the husband, then to such other person and at such time and in such manner as she should, notwithstanding her coverture, by any writing under her hand and seal, attested by three witnesses, direct, limit or appoint, or by her last will in writing, to be by her signed, sealed, published and declared in the presence of the like number of witnesses; to the intent that the property should not be at the disposal or subject to the debts, use or enjoyment of the husband; and in default of such declaration, limitation or appointment, “then the law to make distribution thereof.”

As it seems—though it is not proven otherwise, or further than by the probate, in the year 1839, by a writing under her hand and seal, attested by two witnesses, whose names are subscribed, reciting the power reserved by Mrs. McClintic, in pursuance of the power—as was re-

cited—she, by writing, gave the real estate to the husband.

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Mrs. McClintic having died, her husband surviving, in the year 1840, by the county court of the county of Greenbrier, this paper—as it was stated—purporting to be her will, was presented in court and proved by the oaths of S. A. Porter and Robert McClintic, subscribing witnesses, and ordered to be recorded.

Mrs. McClintic left five heirs; of whom the plaintiff, Ocheltree, is one. Thomas McClintic made a deed to Charles McClung for a part of the land described in the deed of settlement.

In the year 1859, Ocheltree, the heir, made his declaration in ejectment, in which he alone complained, but counted separately in his own name, and in the name of Maze, the trustee, against McClung, and sought a recovery of the land; and Ocheltree alone gave notice and proceeded in the case. He filed the declaration in the circuit court of the county of Greenbrier, and the defendants pleaded not guilty. McClung died, and the action was revived against his heirs. And in 1871, a jury was impaneled and the case was tried.

On the trial, the plaintiffs gave in evidence the deed of settlement: And the parties agreed that at the time of the execution of the deed Miss Maze owned the land described in the declaration, and that she died, and that the plaintiff was one of her five heirs—as has been stated: And the defendants offered in evidence the will of Mrs. McClintic—the paper, the purport of which has already been stated. The plaintiffs moved to exclude the will as evidence of title; but the court refused to exclude it, and the defendants excepted.

The defendants gave in evidence the paper and probate and the deed from McClintic to McClung for the land in controversy.

And the plaintiffs moved the court to instruct the jury as follows:

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1. "Though the will of Mrs. McClintic has been duly admitted to probate, or if not duly admitted, it is now too late to contest the validity of said probate, which is now final and conclusive, yet such probate does not preclude the necessity of proving the instrument as an appointment upon any claim arising under it.

2. "The will of Mrs. McClintic having been admitted to probate, and such probate not having been set aside within the time prescribed by law, it is now final and conclusive; but if the jury shall believe that said will was not executed in accordance with the deed authorizing Mrs. McClintic to make the appointment by will, in a particular manner, then they must find for the plaintiff, Joseph Ocheltree, unless barred in his recovery by adversary possession.

3. "If the jury shall believe that the will of Mrs. McClintic was not executed in the presence of three witnesses, then it was not a valid appointment under the deed, although its validity as a will can not now be questioned, and the jury must find for the plaintiff, Joseph Ocheltree, unless barred by adversary possession."

The court refused to give either of these instructions; and the plaintiff excepted.

And the jury found for the defendants; and the court gave judgment accordingly.

The plaintiff, Ocheltree, appealed.

No question has been argued or suggested by counsel, as to the efficacy of the deed, if an appointment was properly made, to limit an equitable right or terminate the legal title in the trustee and vest the legal and equitable estate in the appointee; or in default of such an appointment, to terminate the estate in the trustee and allow it to revert to the heirs of the bargainor. The principal question argued by counsel relates to the conclusiveness of the probate as to the sufficiency of the appointment.

By the deed, the estate was conveyed by Miss Maze, with the consent of McClintic, to Maze the trustee,

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without express words of qualification or limitation. But the purpose of the conveyance was declared and the intent indicated by language that cannot be misunderstood. This was, that the trustee should hold the land in trust for the temporary benefit of the grantor till the marriage and then for the benefit of the husband during the joint lives, and that if the wife should survive the husband, the trustee should convey the estate to her; but if she should die before the husband, to such person, as she should, by writing under hand and seal attested by three witnesses, or by will signed, sealed and published and attested by like number of witnesses, appoint. If, however, she should not survive the husband, but should die in his lifetime without having made an appointment, then, the whole purpose of the trust, in this aspect, would be accomplished; and there would be no reason why the legal estate should longer remain in the trustee; but on the contrary every reason applicable to the subject would require that the estate should determine in him and revert to Mrs. McClintic's heirs. And accordingly it was by the deed expressly declared, that in default of an appointment the law should make disposition of the estate.

The paper produced and relied on as an appointment appears to have been attested by two witnesses only. Except the record of the probate, there is no evidence offered as proof of the execution of the paper. The law did not require that a will should be published in the presence of three witnesses, as the deed required that an appointment under it should be published. Whether the record sufficiently proved that the paper was executed as a will is by law required to be executed, may be doubtful: That it did not prove the paper was an appointment by will published in the presence of three witnesses, is certain.

The paper was not evidence of title; and the court erred in overruling the motion to exclude it and permitting it to be read as such evidence.



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Each of the instructions asked by the plaintiff and refused by the court was correct—or if not, was incorrect only in conceding too much to the claim of the defendants; and the court erred in refusing to give them either as asked or without the concessions.

Therefore the judgment of the circuit court is reversed with costs, the verdict set aside and a new trial ordered.

All the other Judges concurred.

JUDGMENT REVERSED, VERDICT SET ASIDE AND  
NEW TRIAL ORDERED.

## CHARLESTON.

REED v. PATTERSON.

February 25, 1874.

A. files his bill praying for an injunction to restrain the sale, by a trustee, of a tract of land conveyed to secure the purchase money, alleging "that since the purchase was made, the plaintiff had caused a survey of the land to be made, and instead of there being fifteen hundred acres as represented, there were only nine hundred acres," and this being the only allegation in the bill, on the ground on which relief is asked.—HELD:

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| 7  | 263 |
| 57 | 128 |

1. That the bill does not present sufficient equity, on its face, to justify the interference of a court of equity.
2. Upon a sale of a tract of land in gross, and not by the acre, the purchaser is not entitled to any abatement of the purchase money for a deficiency in the quantity of the land, there being no fraud, misrepresentation or mistake; and the evidence showing that the parties contemplated a probable deficiency in the number of acres specified in the deed, and that said number of acres was not relied upon by the parties as a material element in the purchase.

An appeal, by Robert Patterson, from a decree of the circuit court of Pleasants county, rendered on the 12th day of August, 1872. The complainants below were Joseph S. Reed, Robert R. Reno, David Swope, Arthur W. Reeves and M. Bachman; and the respondents Robert Patterson and Harriet S., his wife, Philander S. Bradford, Aaron R. Doult and W. W. Hall, trustee.

The pleadings, exhibits and depositions taken in the suit were very voluminous; but as the decision of the suit here turned upon the sufficiency of one allegation

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in the bill, alone, to sustain the decree and that is sufficiently stated in the opinion of the Court, it is not deemed necessary to make a further statement of the case.

The Hon. George Loomis, judge of said circuit court, presided at the rendition of the decree from which the appeal was taken.

*Hutchinson & Johnson* for the appellant.

*Robert S. Blair*, for the appellees.

PAULL, JUDGE :

The bill in this case is filed by Joseph S. Reed and four, others as plaintiffs, against Robert Patterson and others, defendants, to enjoin a sale under a deed of trust, executed by the plaintiffs to secure the purchase money due upon the purchase of a tract of land in Pleasants county. The verbal contract had been executed, and a deed made, accepted and recorded by the vendees ; notes were given for the purchase money and a deed of trust made and recorded to secure their payment. The bill, after reciting the foregoing facts, and setting out the deed, deed of trust and the advertisement of sale by the trustee, contains the following allegation : "The complainants further say that they bought the said land believing that they were buying about that amount of land, (referring to the amount named in the deed, to-wit, 1500 acres) but on the 24th day of March, 1871, they caused J. M. Gallaher, surveyor of Pleasants county, to go upon the land in controversy and caused the same to be surveyed, and instead of there being 1,500 acres, as represented, there were only nine hundred and one acres, which makes a deficit of about six hundred acres." The prayer of the bill is that the trustee may be enjoined from selling, until all matters in controversy can be settled, and for such other, further and general relief, as to equity seems just and right. The only ground whatever presented in the bill for invoking the equitable interposition of the court, and staying the progress of the sale,

is found in the words, "and instead of there being one thousand five hundred acres, '*as represented,*' there were only nine hundred and one acres." This is all: it nowhere speaks of the facts and circumstances in which the contract originated; it nowhere charges the defendants with making any representations whatever in regard to the number of acres contained in this tract of land; much less with having made any false or fraudulent representations, or with having used any language of any kind, which would indicate that there had been a mutual mistake or misapprehension between the parties in regard to the subject matter of their contract; nor is there any allegation that the sale was a sale by the acre, or that the quantity was a material element in the contract. The words '*as represented,*' above quoted from the bill, are not followed by the names of the plaintiffs, the vendors of the land or by the names of any other persons whomsoever. The words, therefore, are only properly referable to the deed, which conveys this land, and where, after describing the land, are found the following words: "And said to contain fifteen hundred acres, be the same more or less."

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We think this bill, being entirely silent in all the particulars indicated, and presenting only the above single and ambiguous allegation, at the least, does not present sufficient equity on its face to justify the exercise of the high power of a court of equity in restraining a sale for the benefit of parties, to whom no fraud, misrepresentation, or mistake are imputed, touching the transaction, in any direct or positive manner.

There is nothing whatever which charges or indicates that the contract as now executed in the deed is in any respect different from what it was, or what it was designed to be, so far as these defendants are concerned. Story's Eq. Plead., 256.

The defendants, however, have answered the bill, and fully and explicitly denied all misrepresentations what-

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ever in the inception of this contract ; and going further they affirm that said sale was made in gross, and not by the acre, and that plaintiffs knew as much about the quantity of land contained within the boundaries named in said deed, as did the defendants. And to this answer - there is a general replication and both parties proceed to take testimony.

We have carefully examined this evidence with the view of seeing, whether in the event the cause was remanded, with leave to the plaintiffs to file an amended bill, they have adduced sufficient proofs of such grievance or wrong, on the part of the defendants, as would entitle them to relief.

We briefly state the result ; the issue as made simply is, whether the defendants made such representations as to the quantity of acres in this tract of land, which proved to be untrue, as induced the plaintiffs to buy to their loss or injury.

Three of the plaintiffs, Reed, Reeves and Swope testify that Patterson, on or about the 11th of July, 1870, being the time when the verbal contract for the purchase of this land was made, did represent to them that there were at least one thousand five hundred acres in this tract of land.

On the other hand, P. S. Braford, one of the defendants testifies that said Patterson informed Bachman, one of the plaintiffs, in his presence, some time before the contract was made, that the quantity of land had been reduced by the Board of Supervisors from one thousand five hundred to one thousand two hundred acres, and there might be one thousand two hundred, or there might be one thousand more or less, he could not tell. Robert Patterson, one of the defendants testifies and sets forth with minuteness and detail, what he says, are the facts and circumstances connected with the making of this contract and denies all representations whatever.

The deposition of M. Bachman, one of the plaintiffs, is also taken by the defendants. He testifies that Patterson, one of the plaintiffs, told him before the notes and deed of trust were given, that the number of acres had been reduced by the commissioners from fifteen hundred acres to twelve hundred acres; that he had also learned from proceedings in another law suit, that the defendants here claimed that the quantity was less than fifteen hundred acres; it also seems from the deposition of James M. Gallaher, the surveyor, that he also informed said Bachman that the tract would not run out, probably one thousand acres. Bachman had learned these facts and communicated a knowledge of them to J. S. Reed, one of his partners in the purchase. Although the verbal negotiations for this purchase commenced in July, it was not finally consummated as it would seem from the evidence, for two or three months afterwards—the plaintiffs were in possession of the facts as above stated, before they executed their notes and the deed of trust to secure them, but still they consummated the purchase—the plaintiffs Reed and Bachman coming to the defendant Patterson sometime in September and telling him they desired to do so. Presuming this to be the best showing which the plaintiffs can make, even upon proper allegations in the bill, we think the evidence wholly fails to indicate that they are entitled to relief.

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In the case before us, the contract has been executed. As we have seen, there is no allegation of fraud or misrepresentation on the part of the defendants found in the bill and none is proved. There is no allegation of mutual mistake between the parties, and none is proved. On the other hand it does appear that at least two of the parties who conducted the negotiations for this purchase, did know before the sale was consummated by giving their bonds and executing the deed of trust, that this tract contained not more than twelve hundred acres, at most, and possibly much less. From the period in July, 1870, down to September or October, 1870, during which

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time the matter was still open, ample opportunity was afforded to ascertain the facts in every particular. Under these circumstances we are constrained to the belief, that they made the purchase of this land as in gross and not by the acre. The number of acres specified in the deed as fifteen hundred, is the same number, simply, that was specified in the deed to the defendants and which plaintiffs knew was not correct. We infer, therefore, from their conduct in the premises, and all the circumstances of the transaction, that it was their intention to purchase in this way, taking the hazard of the deficiency upon themselves, and to pay the gross amount agreed upon, for whatever quantity they might obtain.

The rule in such cases has been settled for many years. In *Joliffe v. Hite*, 1 Call. 301, it was held, if the vendor sells, and the vendee buys a tract of land for so many acres, more or less, and it turns out upon a survey that there is less than the estimated quantity, the buyer shall not be relieved in equity. So likewise *Peyton's Adm'r. v. Bradford's Exors.* 5 Leigh, 39; *Pendleton v. Stewart*, 5 Call. 1; *Fleet v. Hawkins*, 6 Munf. 188. In this last case, the court says: "With a full knowledge of all the circumstances, and as much knowledge as to the quantity as the appellant himself is shown to have had, the appellee entered into the contract, and his own construction thereof is shown to have corresponded with ours, by his agreeing in the deed accepted more than ten months afterwards to pay the gross sum resulting as aforesaid."

In this review of the evidence, we do not see that the plaintiffs have made out such a case, as entitles them to the relief which they seek; and under the rule applied in the foregoing cases, the decree rendered in this cause on the 12th day of August, 1872, must be reversed with costs to the appellees, Robert Patterson and P. S. Bradford, and this Court proceeding to render such judgment as the court below ought to have rendered, doth adjudge, order and decree that the bill be and the same is hereby dismissed and with costs to the defendants in the bill.

The other Judges concurred.

DECREE REVERSED AND BILL DISMISSED.

## CHARLESTON.

## LUDINGTON v. HANDLEY.

February 25, 1874.

L. & M. file a bill in chancery, praying for an injunction and general relief against a judgment for the payment of money, on the ground of newly, or after discovered testimony, that the debt was paid off and discharged.—HELD: 1874.  
January Term.

1. That the plaintiffs must show that they have used due diligence, or been guilty of no laches.
2. That, if the evidence is manifestly insufficient to sustain the defence set up, that the injunction was properly dissolved and the bill dismissed.

An appeal, by Ludington, from a decree of the circuit court of Greenbrier county, rendered on the 13th day of October, 1871, dissolving an injunction and dismissing a bill, in a suit therein pending, wherein Samuel C. Ludington and H. D. McClintic were complainants and Austin Handley and J. H. Otey Cary as late partners, composing the firm of Handley & Cary and Alexander Knight then sheriff of Greenbrier county, were respondents.

The decision of the suit, here, depended, alone, upon the sufficiency of the evidence produced in support of the allegations in the bill to entitle the complainant to the relief asked. This is sufficiently set forth in the opinion of the Court, and, therefore, renders any further statement unnecessary.



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The Hon. Joseph M. McWhorter, judge of said circuit court, presided at the rendition of the decree appealed from.

*Miller & Quarrier* for the appellants.

*Robert F. Dennis* and *Adam C. Snyder* for the appellees.

PAULL, JUDGE.

The appellants in this case filed a bill in the circuit court of Greenbrier county, to enjoin the collection of a judgment, obtained by the defendants against the plaintiffs on a promissory note, about eighteen months previous to the filing of the bill. The complainants allege "that since the said judgment was rendered, indeed within the last few days that they have discovered evidence that shows conclusively, that the said negotiable note was long since paid off and discharged, by the maker, Joseph D. Bell, who had departed this life before the said suit was instituted; that although they believe that the debt was paid, they were ignorant of the means of establishing the fact, and could not, although they used all possible diligence, discover the evidence above alluded to, which has just come to their knowledge." Upon these allegations the injunction was granted; the defendants appeared and demurred to the bill; filed their answer and proofs were taken. Upon the final hearing the injunction was dissolved and the bill dismissed; and from this decree an appeal is taken to this Court.

It is admitted that courts of equity have jurisdiction to give relief, in some form, where the defence could not, at the time, or under the circumstances, be made available, at law without any laches of the party. 2 Story's Eq. Jur. sec. 895; 6 Rand 142, and other cases referred to. Proper allegations must be made in the bill, and it must appear to the court that all proper diligence has been employed by the party to discover or obtain the evidence upon which he now relies. Assuming the bill to be sufficient upon its face, how does the case stand upon

the evidence? The chief, indeed the only material testimony in the cause is found in the deposition of Thomas A. Bell. He is the father and administrator of Joseph D. Bell, the maker of the original note in controversy, and who it is claimed had paid off and discharged said note to the holders thereof, in his life time. Thomas A. Bell has long lived within a mile and a quarter of one of the complainants, and conversations were had between them upon this subject, to-wit: the payment of this note. He testifies that he informed Ludington that he, or his son, had paid off this note long before, about the time of its maturity, in 1861; but that he (Ludington) seems to have misapprehended what he said, and supposed or believed, that he was speaking of another note about which he made inquiry. Ludington himself testifies, also, to his misapprehension of the information which he had received from Bell, supposing it applied to another debt of Joseph D. Bell, or, at least, not to the note on which the suit was brought. But waiving any consideration of the sufficiency of the evidence as found in the case to prove due diligence on the part of the complainants, and that they have been guilty of no laches, it is most manifest that the evidence upon which reliance is placed, to prove payment of this note, is wholly insufficient for the purpose, and this must prove conclusive of the case.

The testimony taken to prove payment of the note is simply this: The witness, Thomas A. Bell testifies that, in June, 1861, upon the application of his son, the maker of the note, he gave to him an amount sufficient to pay the note and the costs of protest; that on the same day his son went to find Handley and Cary, the holders of the note, and shortly returned and handed him an order on the cashier of the Farmers' Bank for the note, stating that it had been paid off and that the order was signed by the names of Handly and Cary; this order, however, is not produced, nor is it known where it is, and, *moreover*, the witness says he does not know the handwriting of either Handley or Cary, and, of course,

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cannot say whether the order was given by them or not. On the other hand, the defendants, Austin Handley and J. H. O. Cary both testify that said note was never paid to them, and Cary states that no such order as that referred to in the deposition of Bell was ever given. It was thus apparent to the chancellor that there was no ground for perpetuating the injunction, which was therefore properly dissolved. It has been suggested that the injunction should have been continued, and the matter in controversy submitted to a jury by awarding a new trial. But where the testimony is clearly insufficient to sustain the plea of payment, it is not seen upon what equitable grounds the court could again open the door for litigation. The decree dissolving the injunction and dismissing the bill, is affirmed with \$30 damages and costs to the appellees.

The other Judges concurred.

**DECREE AFFIRMED.**

## CHARLESTON.

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| 446 | 707 |

## LUDINGTON v. RENICK.

February 25, 1874.

A party seeking the rescission of a contract, on the ground of misrepresentations must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied.

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This was an appeal taken from a decree of the circuit court of Greenbrier county, rendered on the 19th day of April, 1871, in three several suits in chancery, then pending in said court, which were consolidated and brought on to be heard together.

In the *first*, Samuel C. Ludington was complainant, and Benjamin F. Renick and Benjamin F. Harlow, respondents.

In the *second* the said Ludington was complainant, and Calvin B. Renick, Joseph H. Correll, administrator of William Renick, deceased, Hiram Scott, administrator of Thomas B. Renick, deceased, Mary E. Renick, Esther Renick and Thomas Q. Renick, respondents.

In the *third*, John W. Dunn was complainant, and said Scott as administrator of said T. B. Renick, said B

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F. Renick, C. B. Renick, Samuel C. Ludington, Mary E. Renick and Thomas Q. Renick, and also Margaret E. Renick, respondents.

The appeal was taken by said Ludington.

The record of the case is very voluminous; but as the decision here turned upon the sufficiency of the evidence in the suit to sustain a decree rescinding the contract in the bill and proceedings mentioned—and as all the material testimony bearing upon this point is set forth in the opinion of the Court—it is not deemed advisable to state, further, the facts in the case.

The Hon. Joseph M. McWhorter, judge of said circuit court, presided at the hearing and decision below.

*Samuel Price, Adam C. Snyder and Mathews & Mothers* for the appellant.

*Caperton & Patton* and *Robert F. Dennis* for the appellees.

PAULL, JUDGE:

In February, 1868, the plaintiff filed his bill in the circuit court of Greenbrier county, praying for the rescission of a contract made between himself and the defendant Benjamin F. Renick. The bill recites that in two suits in equity pending in said circuit court, the one prosecuted by the plaintiff and the other by John W. Dunn, (the two suits having been consolidated,) a decree was rendered at the — term, 1867, directing certain lands, formerly the estate of Thomas B. Renick, deceased, to be sold for the payment of certain debts due to the plaintiff, to said Dunn, and other creditors of the said T. B. Renick; that after this decree had been pronounced, the said B. F. Renick stated to the plaintiff that his debts against the estate of his son, the said T. B. Renick, as recognized by the decree aforesaid amounted to \$20,107, or about that sum; that the said Renick further assured the plaintiff that he (Renick) had become the owner of the debt due to the said John W. Dunn; that it amounted to \$4,200, and was a preferred

debt, and that it would be so in the plaintiff's hands, and that he assured the plaintiff that he owned two-thirds of the debts against the estate of said T. B. Renick; that the plaintiff replied that he was willing to give for the land of said T. B. Renick, so decreed to be sold, \$23,500 in the payments therein expressed; that a calculation was made upon this basis as to what the said B. F. Renick would be entitled to from the decree aforesaid which amounted to the sum of \$8,900, which the plaintiff agreed to pay to the said Renick for his interest in said decree; this amount was to be paid at the times and in the amounts in said bill set forth, and that a contract was executed between the parties to this effect, and transferring the debts of B. F. Renick against the estate of T. B. Renick to the plaintiff.

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The bill then avers that said adjustment was made upon fraud or mistake; and that the statements made by said Renick were in many respects erroneous:

*First.* That the debt decreed to said John W. Dunn was not a preferred debt, but a debt to be paid in common with the other debts, at large, of the estate.

*Second.* The said Renick's debts against said estate did not amount to the said sum of \$20,107, or near that sum, perhaps not to as much as \$17,000.

*Third.* The debts due to said Renick were not two-thirds of the whole indebtedness of the estate, or near so much, the whole indebtedness being about \$55,000; and that the foregoing contract was iniquitous and unjust. The bill then prays that the bonds given in pursuance of said contract be set aside and canceled, and for general relief.

The defendant B. F. Renick files his answer, setting forth the contract in full, which recites that the plaintiff had bought of said B. F. Renick his entire interest and claims against the estate of T. B. Renick, deceased, both real and personal, for which the plaintiff bound himself to pay to J. W. Dunn the entire amount of his claim against T. B. Renick and B. F. Renick, security, the

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said claim amounting to upwards of \$2,200, more or less ; and said contract further recites that he had executed his bonds to the said Renick for \$6,500, in the aggregate, to be paid in the sums and at the times therein stated. The answer denies fully and explicitly that the defendant made the representations set forth in the bill, which are charged as false ; denying in detail, and specifically, all the allegations of the bill in that particular, and all imposition and fraud.

In the absence of a demurrer to the bill, and of any controversy before this Court in regard to its sufficiency we shall assume that the bill discloses sufficient equity upon its face to justify the jurisdiction of the court.

Under the clear and explicit denial on the part of the defendant, B. F. Renick, of all the allegations of the bill on which the imputation of fraud or mistake is founded, it becomes imperative on the plaintiff to establish, by satisfactory and irreffragable proofs, the charges which he has made of misrepresentation and fraud, leading to the procurement of a contract so iniquitous and unconscionable as to authorize him to invoke the exercise of the high powers of a court of equity to secure its rescission. Whether the evidence be of mistake or fraud, it should be of such clear and conclusive character, as to leave no reasonable doubt that the allegations relied upon are true.

Conceding that the misrepresentations set forth in the bill are of things material, constituting an inducement or motive to the acts of the plaintiff in this matter, are they established by such proofs as will, under the circumstances and surroundings of the parties at the time when this contract was made, justify its rescission ? This appears to be the chief, perhaps the only, question presented for our determination, and to this question our attention will be now directed.

In the year 1862, Thomas B. Renick died seized of a large tract of land in the county of Greenbrier, contain-

ing about eighteen hundred acres. This land had been conveyed to said Renick by a deed in which a lien had been reserved for the purchase money. The bonds given for this purchase money had been transferred to Ludington, the plaintiff in this suit, and he commenced and prosecuted proceedings in the circuit court of said county for the enforcement of the lien. About the same time another bill was filed by John W. Dunn, a creditor of the said T. B. Renick for a settlement of his estate and the payment of decedent's debts. In these two suits, which were consolidated by the court, an account was taken by commissioners, of the nature and amount of decedent's debts and liabilities; and on the fourteenth day of June, 1867, a decree was entered for the sale of the aforesaid tract of land, and directing how a distribution should be made of the proceeds of sale for the payment of debts, and specifying the claims of the plaintiff as entitled to be first paid; the amount of his claim, or lien, amounted, at this time, to about ten thousand dollars. The record further discloses that at this time the plaintiff was in possession of this tract of land, and had been for four or five years, under a purchase or title, which had not or could not be perfected. It further appears that defendant Renick was a creditor to a large amount of the estate of his son, T. B. Renick, and that his debts or claims, with others, had been proved before the commissioner and reported to the court in the suits aforesaid. The contract in plaintiff's bill mentioned, originated in the attitude of the parties thereto, towards this tract of land aforesaid, and the relation of these parties to each other at the time this contract was made now appear. Both were creditors of said T. B. Renick, to a large amount and both seeking payment out of this land; the plaintiff's debt was prior to all others; in addition to this, the plaintiff was in possession of this land which he had at one time bought, but for which he could obtain no title. Under these circumstances both parties were interested in the sale decreed, as the source whence

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payment was to be had for their respective claims; while the plaintiff, being in possession, naturally desired, in addition, to perfect his title by a purchase of the land. Under these circumstances and relations of the parties, the contract was made, the plaintiff becoming thereby a creditor to so large an amount, as would enable him to control the sale, when the same should be made. To this effect, also, is the testimony of B. F. Harlow. The character of a contract for fairness or honesty must be judged of at the time it is made, and in the light of the circumstances then surrounding the parties. Each, in this instance, doubtless, regarded it as his interest to be in a position to control the sale; hence the negotiation which finally resulted in making the contract, whereby the plaintiff became the owner of the defendant's claims against the land, and resulting in his purchase of the land, when sale was made. Of this contract the plaintiff now complains, as having been entered into on his part through false representations in the three particulars named in his bill.

Upon turning to the testimony, we find the amount bearing upon this point to be very limited. If we are not mistaken in our examination, we find but one witness, William F. Williams, who testifies to any declarations of the defendant that were made directly to the plaintiff himself. Quite a number of other witnesses speak of the declarations of defendant in conversations had with them in regard to some one or more of the the particulars of which the plaintiff complains, but it does not appear that these declarations were made to the plaintiff himself, or in his presence or hearing, and, consequently, the testimony of these witnesses is inadmissible. Mr. William F. Williams' deposition is twice taken by the plaintiff; in the first, he states that he was present at a conversation had between these parties, at his house, when the contract was made, and heard the defendant say that more than two-thirds of the debts due from the estate of T. B. Renick, deceased, were due to

himself, and that at that time the plaintiff purchased the said claims of the defendant. In his cross-examination, he says he had no recollection of any explanation made by the defendant, before or at the time of writing the bonds or articles of agreement between them; did not know the amount to be paid by Renick, or the purport of the obligation between the parties. In his second deposition, he says he was present when the trade was made and heard defendant speak of a debt due John W. Dunn, which he said was a preferred debt, and which, according to his recollection, defendant said amounted to \$4,200. In his cross examination, he says that he does not recollect whether he understood the bargain to be about closed when the parties arrived at his house. This witness states himself that he heard but a part of the conversation, and understood nothing of the nature and extent of the contract between the parties, nor how the statements of which he speaks came to be made, nor their bearing upon the acts of the parties. Excluding from consideration the testimony of the plaintiff and defendant, one of whom affirms and the other expressly denies the averments of the bill, thus being in irreconcilable conflict, the case of the plaintiff seems to rest upon the testimony of Williams. There is quite a mass of testimony in the record, but it relates to other aspects of the case, not material to consider.

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We now turn to other evidence bearing upon this subject in the record. The bill alleges that the defendant stated that his debts against the estate of T. B. Renick *as recognized by the decree* in the cases therein referred to, amounted to \$20,107, or about that sum, and that a statement of figures was then produced, said to have been taken from commissioner Caldwell's report, the foundation of the decree, showing the said Renick's debts to amount to that sum. The plaintiff himself thus shows by his bill that this declaration of defendant as to the amount of his debts against the estate of T. B. Ren-

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ick, was founded upon the proceedings in the case, and upon the decree in the case, or cases of himself and Dunn, set forth in the bill.

It is most manifest that the proceedings in these cases then, or now, consolidated, and in which a decree had been entered, would furnish him with all needed information upon all the matters of which he now complains, and to this source of information, his bill recites he was expressly referred by the plaintiff himself.

To this source the plaintiff did go. Joseph F. Caldwell, the commissioner, testifies that before his report was made, the plaintiff had several conversations with him, and had the opportunity of seeing his report, and that he told him B. F. Renick's claims would amount to the neighborhood of \$18,000. From the account of the commissioner, as then taken and stated, the plaintiff would also gain information as to the entire amount of indebtedness of the estate of T. B. Renick; here also he would learn the true state of the facts as to the alleged preferred debt of John W. Dunn, as well as the amount of the claims of defendant B. F. Renick. If there was error in the statements of B. F. Renick, in any respect, here the error could be corrected. With these means of full information in his hands; the account, proceedings, and decree made in his own case, and having had full opportunity to examine the same; and then, two months after that decree was rendered, deliberately making the contract complained of, we think he must be required to abide the result, as against the fragmentary statements and imperfect recollections of a single witness, adduced to prove the declarations of the defendant, alleged to have been made in any manner contrary thereto. That decree was entered on 14th day of June, 1867, and the contract was made the 7th day of August, 1867.

We now notice two or three matters connected with these proceedings, of which the plaintiff was informed. He would learn from the report, that the whole indebtedness of T. B. Renick's estate was something over \$38,-

000, and not \$55,000, as set forth in the bill. He would learn that the claim due to John W. Dunn although recited in the account of the commissioner as a preferred debt, was, by the *decree*, directed to be paid, *ratably*, with all other debts, after paying off the liens. And thus any erroneous impressions on his mind as to these matters were here corrected. With this full knowledge, or means of knowledge of these things, and with their conformity or otherwise with the alleged declarations of the plaintiff, he entered into the contract, understanding its entire consequence and effect.

But it is said on behalf of plaintiff that he was misled or deceived by the defendant in his representing his claims against the estate of T. B. Renick at \$18,000 or \$20,000, while in fact he had assumed and made his own a debt due by T. B. Renick and himself, as surety to one Thomas Creigh, the amount of this debt being at the time about \$10,000, and that consequently this was not a claim against the estate of T. B. Renick. We have looked into the evidence upon that point, and are satisfied that whatever domestic reasons or obligations may have existed, there was no legal obligation on the part of B. F. Renick to discharge this debt, otherwise than as surety, and when discharged it would become a valid claim against the estate of T. B. Renick. We do not perceive, therefore, that there was any material error in this respect. In the contract itself the John W. Dunn debt is stated as amounting to \$2,200 more or less, and not to \$4,200, as the bill charges the defendant with having declared to the plaintiff, so that he is not misled in that particular. With this review of the facts and evidence, let us look for a moment at the law applicable to the case.

It is certainly necessary in all cases of misrepresentation that a party asking the rescission of a contract should make it clearly appear that he was misled by them to his injury; if he knew that the statements were false at the time, he is not entitled to relief; and this would be

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equally true if the mistatements were not relied on, or not reasonably relied on by the complaining party." Such (Adam's Equity, 399), for example, will be the case, if the party to whom the representation is made, resorts to the proper means of verification so as to show that he, in fact, relied on his own inquiries; or if the means of investigation and verification are at hand, and his attention is drawn to them; or if the representation regards a mere matter of opinion or inference, with respect to which, both parties have equal means of forming a judgment."

In *Slaughter's Administrator v. Gerson*, 13 Wallace (Sup. Ct. U. S.) 379, it was held, "that where the means of knowledge are at hand, and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of the means and opportunities, he will not be heard to say in impeachment of the contract of sale that he was deceived by the vendor's misrepresentations." Justice Field said: "A court of equity will not undertake any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. When the means of knowledge are at hand, and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of the means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before him, when no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by his confidence in the statements of another.

And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained.

See also the case of *Atwood v. Small* therein cited; and the same doctrine is held in other cases where the means of information are at hand and equally open to both parties.

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The plaintiff's application for relief, tested in the light of these principles, seems to be precluded.

His bill alleges that he was willing to give for this land \$23,500; he bought it at the sale for \$18,300. Had the land been sold to a stranger for the former amount, there would have been added to the distributable fund the sum of \$5,200, which would have greatly increased the percentage received by the plaintiff on the debts which he purchased of the defendant Renick; but the amount of this \$5,200 he now has in his own estimated value of the land; at all events the reduced percentage received from the reduced price at which the land was bought cannot be imputed to the contract; nor can subsequent events in any way affect it, if valid when made.

The decree rendered in this cause by the circuit court of Greenbrier county on the 19th day of April, 1871, is reversed with costs to the appellee, B. F. Renick, he being the party substantially prevailing here, and this Court proceeding to render such decree as the court below should have rendered, doth adjudge and order that the bill of the plaintiff be dismissed, but without prejudice to any right defendant, B. F. Renick, may have, by any proper remedy, to enforce his said contract with the plaintiff, in whole or in part.

The other Judges concurred.

DECREE REVERSED AND BILL DISMISSED.

## CHARLESTON.

ROSS *v.* JENKINS.

February 25, 1874.

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In a suit at law in which an attachment was sued out, and levied on property of the defendants and judgment obtained therein against the defendants on publication, a part of the defendants appeared in the court in which the judgment was rendered within five years from the rendition of the judgment, and tendered to the court their petition praying for a re-hearing of the proceedings in the action without accompanying the petition with the affidavit prescribed and required in such cases by the act of the Legislature passed the 11th day of February, 1865, entitled, "An act to amend and re-enact sections twenty-three, twenty-seven and twenty-eight, of chapter one hundred and fifty-one and section thirteen of chapter one hundred and seventy, of the Code of Virginia," and also by the twenty-seventh section, of chapter one hundred and six, of the Code of West Virginia, which affidavit so prescribed is commonly known and called "The Suitors Test Oath." The court refused to receive and allow the petition to be filed.—HELD:

1. That it was error in the circuit court to refuse to allow said petition to be filed, on the ground that it was not accompanied by such affidavit, or test oath.
2. So much of the said act of the Legislature, and section twenty-seven, of chapter one hundred and six, of the Code of West Virginia, as prescribe such affidavit or test oath, are contrary to the Constitution of the United States and to the Constitution of the State of West Virginia, and were, therefore, null and void from their passage.
3. The petition in the case is sufficient and should now be received by the court below and ordered to be filed and further to proceed in the same, as justice requires and the law directs.

An appeal by Thomas J. Jenkins, William A. Jenkins, George W. Holderby, Warren P. Rece, Peter C. Buffington and William H. Buffington, from an order of the circuit court of Cabell county, refusing to permit the parties above named to file their petition and application for a re-hearing of a certain judgment rendered in certain proceedings at law against them and others, wherein Robert Ross was plaintiff. The petition was tendered on the 20th day of June 1866 and the objections to the filing of such petition were sustained on the 7th day of January 1870.

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The only question involved in the cause was the constitutionality of certain acts of the Legislature, requiring parties, as a pre-requisite to the re-opening and re-hearing of judgments, in certain proceedings, to take and file a certain oath known as the "Suitors' Test Oath." The material facts sufficiently appear in the opinion of the Court.

The Hon. James W. Hoge, judge of the 11th circuit as organized under the act of July 17, 1868 presided at the trial below.

*Caleb Boggess* and *Lucian C. Ricketts* for appellants.

*James H. Ferguson* and *C. W. B. Allison*, for appellee.

HAYMOND, PRESIDENT:

This, like the case of *Thomas Kyle v. Thomas J. Jenkins*, decided by this Court at the June term 1873, 6 W. Va., 371, is an action of trespass on the case commenced in the circuit court of the county of Cabell by the appellee, (Ross), against the appellants, and several other persons. The cause of action set out in the declaration is assault and battery and injury and destruction of plaintiffs property &c. An attachment was sued out by the plaintiff in the action, and levied upon a large quantity of lands of the defendants to the action. The cause was prosecuted to verdict and judgment against the appel-



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lants, and others, on publication, and the lands upon which the attachment was levied were ordered by the court, by reason of such levy, to be sold to satisfy the judgment. The judgment appears to have been rendered on the 21st day of November, 1864, for \$30,000.00 damages the amount of the verdict of the jury, and costs of suit. And the order directing sale of the lands to be made to satisfy the judgment was made on the same day.

On the 20th day of June, 1866, the appellants and others appeared in court and, by their attorney, tendered to the court, and asked leave to file, a petition to have the proceedings in said action reheard, and the appellee then and there appeared in court to said petition, by his attorney, and waived notice of said motion, and objected to the filing of the petition on these grounds :

*First.* The petition does not state the facts required by law.

*Second.* The petition is not sworn to.

*Third.* Is not accompanied by the affidavit required by law.

Afterwards, on the 7th day of January, 1870, the circuit court, by its order and judgment then made and entered of record, sustained the objections, so made by the appellee, by his counsel, to the filing of said petition, for a rehearing of the proceedings in the cause, and refused to allow the petition to be filed, because of said objections. To this opinion and judgment of the circuit court, refusing to permit the petition to be filed the appellants and their co-petitioners excepted, and their bill of exceptions was signed and sealed in due form, and made a part of the record. The petition is copied in the bill of exceptions. From the judgment of the circuit court refusing to permit the appellants, and their co-petitioners to file their said petition praying for a rehearing of the proceedings in said cause, the appellants have appealed to this Court. The undertaking for the appeal in this cause, to this Court, was filed with the

clerk of the circuit court of said county of Cabell on the 22nd day of February, 1870. On the 3rd day of March, 1870, the notice of the appeal was served on the appellee, and on the same day the notice, so served, was filed with the clerk of said circuit court. From the date last aforesaid until the present the appeal has been pending in this Court. The petition, on its face, is sufficient, and for the reasons stated in the opinion of this Court in the said cause of *Kyle v. Jenkins*, the said circuit court of the county of Cabell erred in refusing to permit the said petition, for a re-hearing of the proceedings in said action, to be filed. We are further of the opinion that the affidavit mentioned, and referred to in said opinion, as being commonly known as the "suitor's test oath," and the acts of the Legislature, in said opinion mentioned and cited, requiring the same, in the cases specified, were contrary to the Constitution of this State of 1863, and null and void; and for the same reason they are determined to be contrary to the Constitution of the United States.

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The opinion and judgment of the circuit court of the county of Cabell rendered on the said 21st day of November, 1864, refusing to permit the said petition for a re-hearing of the proceedings in said action to be filed, must be reversed, and the appellants recover against the appellee Robert Ross their costs here expended.

And this Court proceeding to give such judgment as the said circuit court should have given, the cause must be remanded to the circuit court of Cabell county, with directions to it, to allow and permit the said petition for a re-hearing of the proceedings in said cause to be filed, and to grant the re-hearing prayed for, unless legal and sufficient reason, other than any now appearing by the record, be shown, why the prayer of the said petition should not be granted; and further to proceed in the same as justice requires and the law directs.

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HOFFMAN and PAULL, Judges, concurred. MOORE, Judge, did not sit at the hearing and determination of this cause.

JUDGMENT REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

NOTE BY REPORTER.—At the same term, in two suits, one between John Alford, plaintiff, and the same defendants, the other between Julius Frental, plaintiff, and same defendants, the same principles were adjudicated, upon a similar state of facts. The Reporter does not deem it necessary to publish these opinions in full, as the judgments in them were but in affirmation of the principles decided in the foregoing case of *Ross v. Jenkins*.

## CHARLESTON.

HURST v. M. V. B. HURST.

February 27, 1874.

S. H. (and wife), the rightful owner, in fee simple, of a tract of land, and the father of M. V. B. H., conveyed to M. V. B. H. by deed dated the 9th day of December, 1863, said tract of land, situated in Harrison county, this State. In the early part of the deed the consideration of the deed is stated to be one dollar. The land is described in the deed by meter and bounds, and as containing one hundred and ninety acres, "to have and to hold the above described tract of land, with its appurtenances, to the said M. V. B. H., and his heirs and assigns forever. And S. H., and wife, covenant to and with, the said M. V. B. H., his heirs and assigns, to warrant and defend, generally, the above described tract, or parcel, of land, to the said M. V. B. H., his heirs," &c. In the deed immediately after the last recited clause, are the following clauses, the one immediately following the other, viz: "(It is fairly understood that the above described tract or parcel of land is to be the said M. V. B. H.'s share of father S. H.'s estate.) And it is further understood that I, S. H., hold a life interest in the above described tract of land."—HELD:

1. That in ejectment the deed should be so construed as to arrive at the true intent of the grantor and grantee, and that in so doing the whole of the deed, and all its parts, should be considered together.
2. That, adopting the above rule, the plain legal effect of the deed, from its face was, and is, to convey to M. V. B. H. an estate in fee simple in the land to commence upon the death of S. H., and that S. H. reserved to himself an estate for, and during, his life in the land.
3. That it was right and proper, in such case, for the court below to construe the deed according to its legal effect, from its face, and to instruct the jury as to what was its effect in law.

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4. That parol evidence as to the acts or declarations of the parties, at the time of the execution of the deed, or afterwards, is inadmissible and incompetent in such case, as evidence to enlarge, restrict, explain or alter the intention of the parties, as expressed in the deed, or to vary the legal effect thereof, as clearly manifested by the deed itself.
5. That the deed is not so ambiguous as to admit of the introduction of such parol evidence for the purpose of determining the true intent and meaning of the parties, by the language employed in the deed; or to show that it was the purpose and intent of the parties at the execution of the deed, that the deed should pass to M. V. B. H. an estate in fee simple, to take effect at the execution and delivery thereof, and not an estate in fee simple, to take effect at the death of S. H.

This was an appeal by Martin Van Buren Hurst, from a judgment on the verdict of the circuit court of Harrison county, rendered on the 30th day of May, 1870, in an action of ejectment then pending in said court, between Shadrach Hurst, plaintiff, and said Martin Van Buren Hurst, defendant.

The case was brought here for the construction, by this Court, of two clauses in the deed from the appellee to the appellant. The questions were raised in the court below by several instructions, asked for by the plaintiff and defendant, respectively. So much of the deed and instructions aforesaid, as is material to be set forth here, will be found in the opinion of the Court.

The Hon. Thayer Melvin, judge of the first judicial circuit, presided at the trial below.

*George H. Lee and Caleb Boggess*, for the appellant.

*C. C. Cole*, for the appellee.

HAYMOND, PRESIDENT:

This was an action in ejectment, brought in the county of Harrison. There was an office judgment had against the defendant at rules on the first Monday in May, 1869. Afterwards, at a circuit court held for said county, on the 27th day of May, 1869, the cause came regularly on the docket, and the plaintiff and defendant appeared in

court, by their attorneys, and on motion of the defendant the office judgment, had in the cause, at rules, was set aside, and the defendant, for plea, pleaded that he was not guilty in manner and form as the plaintiff in his declaration has complained; and of this he put himself upon the country, and the plaintiff did likewise. The cause was regularly continued until a circuit court held for said county, on the 28th day of May, 1870, at which the parties both appeared in court, by their attorneys, and there was a trial by jury regularly had, and the jury, by their verdict, found for the plaintiff, the land in the declaration mentioned and described, and that the plaintiff hath an estate therein for and during, his natural life, and assessed the plaintiff's damages at one cent. Upon this verdict the circuit court, during the same term, rendered judgment in favor of the plaintiff, and against the defendant, for an estate, during his life, in the land in the declaration mentioned, describing the metes and bounds of the land, as they are described in the declaration, and for the damage, and also plaintiff's costs of suit. During the trial of the cause the defendant took two bills of exception to the rulings of the court, which bills are numbered numbers *one* and *two*. By bill of exception number *one*, it appears that on the trial of the cause, after the plaintiff had given in evidence to the jury a deed in these words, viz:

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"This deed made this 9th day of December, 1863, between Shadrach Hurst and Catharine, his wife, of the county of Harrison and State of West Virginia, of the one part, and Martin Van Buren Hurst, of the same county and State of the other part, witnesseth:

"That the said Shadrach Hurst and Catharine his wife, for and in consideration of the sum of one dollar, have granted, bargained and sold unto the said Martin V. B. Hurst, his heirs and assigns forever, a certain piece or parcel of land, lying in said county of Harrison on Owen Davis' Fork of Limestone creek, and bounded," &c. (the boundaries the same as contained in the declar-

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ation) "to have and to hold the above described tract or parcel of land, with its appurtenances, to the said Martin V. B. Hurst, and his heirs and assigns forever. And the said Shadrach Hurst, and Catharine, his wife, covenants to and with the said Martin V. B. Hurst, his heirs and assigns, to warrant and defend, generally, the above described tract or parcel of land to the said Martin V. B. Hurst, his heirs, &c., against all persons or claims, whatever. (*It is fairly understood that the above described tract or parcel of land is to be said Martin V. B. Hurst's share of his father Shadrach Hurst's estate.*) And it is further understood that I, Shadrach Hurst, hold a life interest in the above described tract of land. As witness the following signatures and seals, this 9th day of December, 1863."

This deed was signed, sealed and acknowledged by Shadrach Hurst and wife on the day of its date, and duly admitted to record in the Recorder's office of said county, on the 30th day of January, 1864. And also, after the plaintiff had given to the jury evidence tending to prove, that after the date of the said deed, the plaintiff continued in the possession of the land therein mentioned, claiming the same as his property, until the first day of January, 1867, and with the consent and approval of the defendant occupied the land and claimed the same as his own, during his life, and still claims the same. And after the defendant had admitted in court that he did not claim the land as tenant of the plaintiff, but that he claimed the same adverse to him, and in fee simple, the said defendant gave evidence to the jury tending to prove the following facts, viz: That at the time of the execution of the said deed, the plaintiff delivered the possession of the land therein mentioned to the defendant, who then took possession thereof and continued to hold the same ever since, claiming the title thereto; that afterwards, on the 1st day of January, 1864, the plaintiff sold and delivered to the defendant all his personal property, including his stock on said land, which was a part of his

home farm, at a price to be paid to his heirs as he should provide by will ; that from the date of the deed the defendant occupied, cultivated and improved the premises, and has continued to do so ever since ; that in part consideration of the conveyance of the land by the plaintiff to the defendant at the date of the deed aforesaid, it was agreed by the parties that the defendant should maintain and support the plaintiff and his wife during their lives ; that the defendant did support them afterwards until the first of January, 1867 ; that up to this time they lived together on the premises, and that the plaintiff then left defendant, and took up his abode elsewhere ; that about the time of executing the deed, and afterwards the plaintiff repeatedly disclaimed any ownership of said land, or any property whatever, and claimed to be only entitled to maintenance and support out of said land ; that in the year 1864, the plaintiff directed the personal property, and said land to be charged on the commissioner's books of the revenue, for taxation, to the defendant : that said property was so charged from 1865 to 1869, both inclusive and taxes thereon paid by the defendant ; that in the winter of 1864 and 1865, the plaintiff, when applied to for a lease of part of said premises, disclaimed any right to lease the same, and turned the applicant over to the defendant as the proper person to make said lease, stating that he had the legal title thereto. All this evidence, except the deed and assessment and payment of taxes, was parol. In this state of the case, the plaintiff, by his attorney, asked the court to instruct the jury as follows : "*First.* The deed from Shadrach Hurst to Martin Van Buren Hurst, dated December 9, 1863, and given in evidence to the jury, creates and reserves to the said Shadrach Hurst an estate for life in the land in the said deed described, and in controversy in this suit, and if Shadrach Hurst was at the time of the making of said deed in possession of said land, he was not divested of the possession thereof by the execution of said deed. *Second.* If the jury believe from the evidence that at the

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time of the institution of this suit the defendant was in possession of the land in controversy, they must find for the plaintiff, unless they further believe from the evidence that since the 9th day of December, 1863, the date of the deed from plaintiff to defendant, the plaintiff, by deed or writing, under seal, conveyed to the defendant the life estate reserved therein to himself."

To which instructions, and each of them the defendant objected, and moved the court to instruct the jury as follows:

"*First.* If the jury believe from the evidence that in the execution of the deed from the plaintiff to the defendant of the 9th of December, 1863, it was the intention and purpose of the grantor to pass the legal title, presently, to the grantee, they will give such effect to the deed in determining the issue before them.

"*Second.* It is proper for the jury to consider the acts and declarations of the plaintiff and defendant in relation to the ownership and control of said land since the 9th day of December, 1863, and prior to the institution of this suit, to determine whether the right of possession thereof was conferred upon the defendant by the deed of the former date.

"*Third.* If the jury shall believe from the evidence that the land in controversy is the same land embraced in the deed from the plaintiff, dated the 9th day December, 1863, and offered in evidence by the plaintiff, that they are to consider the said deed as passing, *in presenti*, the absolute fee simple title to the land."

To giving the instructions so asked by the defendant the plaintiff objected. The court overruled the defendant's objections to the instructions asked by plaintiff, and gave them to the jury as asked, and sustained the objections of the plaintiff to the instructions asked by the defendant. By bill of exceptions number two of defendant, it appears that upon the trial of the cause it was admitted by the parties, that the plaintiff, on the 9th day of December, 1863, was in possession of and the

owner in fee simple, of the land in the declaration mentioned; and that on the day and year last aforesaid, the plaintiff executed and delivered to the defendant the deed of that date set forth in the defendant's *first* bill of exceptions in this cause; and that at the time of the commencement of this suit the defendant was in the possession of the land mentioned in said deed, which is the same land described in the declaration in this cause, claiming the same, not as a tenant of the plaintiff, but in fee simple and adverse to the plaintiff; that in addition to the facts above stated, the defendant and the plaintiff gave evidence to the jury tending to prove the facts set forth in the defendant's first bill of exceptions, which is herein referred to and made part of this bill, which facts are substantially all that were admitted, or that said evidence tended to prove. And the defendant moved the court to instruct the jury as follows:

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"*First.* If the jury shall believe, from the evidence that the land in controversy is the same land embraced in the deed from the plaintiff, dated the 9th day of December, 1863, and given in evidence to the jury by the plaintiff; and if they further believe from the evidence that the plaintiff, at the time of the institution of this suit had no other right to recover the possession of said premises against the defendant than his previous ownership and rightful possession of the premises together with any interest thereto retained, or reserved, in said deed, then they must find for the defendant.

"*Second.* And if the jury shall further believe from the evidence the plaintiff put the defendant in possession and has no other right to recover the possession of said premises than his previous rightful ownership and occupancy thereof, and the reservation therein contained in the conclusion of said deed, that they must find a verdict for the defendant."

To the giving of which instructions by the court, the plaintiff objected, and the court refused to give the instructions, and the defendant excepted. The questions

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now to be determined are whether the court erred in giving the two instructions asked by the plaintiff, and whether the court erred in refusing to give the several instructions asked by the defendant. The first instruction asked by plaintiff, and given by the court simply embodies the opinion of the court, as to the proper construction and the legal effect, of the deed from plaintiff to defendant. If the opinion of the court of the legal effect of the deed is correct, then the instruction given was proper in the form it was given. And if the first instruction asked by plaintiff, and given by the court, is correct, then there can be no doubt as to the second instruction asked by plaintiff, and given by the court, being also correct, and proper. If the two instructions given by the court, at the instance of plaintiff, are correct, then each and all the instructions asked by the defendant, to be given, and which were refused, were incorrect, and were properly refused. By the Code of Virginia of 1860, chapter one hundred and sixteen, section five, which was in force in this State in 1863, any estate may be made to commence *in futuro*, by deed, in like manner as by will. And any estate which would be good as an executory devise or bequest, shall be good if created by deed. An estate for the tenant's own life is, in the estimation of the law, a better one and of a higher nature to him, than one for the life or lives, of another or others. And it has been held that in construing grants when the language is equivocal, that construction is given which is most favorable to the grantee; where a grant is made to one with no other words of limitation, he will be entitled to an estate during his own life, if the estate of the grantor will allow him to convey such an estate. See 1st Wash. on Prop., 3rd ed. chapter five, section five, and authorities there cited, under the head of "Estates for Life." So, I apprehend, when the owner of land, in fee simple, conveys the land in fee simple reserving therein a "life estate" it should be construed as meaning an estate for the life of the grantor is reserved.

*Webster v. Webster*, 33 New Hamp. 22. If any thing is to be reserved out of the property granted, it is usually done by the clause of *redendum*, as it is called, which commonly follows that of the *habendum*. See third vol. of Wash. Prop., 3d ed., side page 645. The word "interest," often, is used to express or represent "estate." As for instance an "interest" in a tract of land is often used as meaning the same thing as an "estate" in a tract of land. These two words are not unfrequently used as convertible terms. In the Code of Virginia of 1860, chapter one hundred and sixteen, sections two and five, and in the Code of 1868, chapter seventy-two, section eleven, the word interest is employed to represent "estate" and as meaning the same thing. The word "interest," as coupled with the word "life," in the deed from plaintiff to defendant evidently means a life estate; and taking the whole sentence together, the "life estate" means an estate for the life of the grantor. Reading the sentence as thus construed, it would be thus: And it is further understood that I, Shadrach Hurst, "hold" an estate for my life in the above tract of land. What was the meaning and intention of the grantor in the use of the word "hold" as employed in the foregoing sentence? We must gather the intention of the parties, as well as we can from the words of the deed. And in construing the deed all the parts are to be taken together, and force given to the grant, and reservations, according to the intention of the parties. *French v. Carhart*, 1 Comstock, (N. Y.), 109, opinion of judge Johnson; *Swick v. Sears*, 1 Hill (N. Y.) 19; judge Bronson, in delivering the opinion of the court in this case, says, "The offer to show, by parol evidence, what the parties intended by the deed, or the reservation which it contains was properly overruled. After ascertainining the existing state of things, at the time the deed was executed, the instrument be left to speak for itself. We cannot give any effect to what the parties may have said, at the time, by way of enlarging the operation of the deed, without in effect al-

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lowing the instrument to be contradicted by parol, and saying that the title to real estate may pass without writing." *Richardson v. York &c*; 14 Maine 216. The sentence immediately preceding the one under consideration reads, "It is fairly understood that the above described tract or parcel of land is to be the said Martin V. B. Hurst's share of his father's, Shadrach Hurst's estate." The purport of the deed shows the money consideration for the deed was only nominal, and this fact, connected with the sentence just quoted, shows clearly that the conveyance of the land was a mere gift by the father to the son, and that the deed was in fact what is frequently called a "will deed," and should be construed accordingly. The purport of the deed, or rather the *habendum* purports to pass a fee simple estate. It is admitted that the grantor was, at the date of the deed, the rightful owner in fee simple of the land. And if he was conveying an estate in fee simple, why did he use the words, "And it is further understood that I, Shadrach Hurst, hold a life interest in the above described tract of land?" Clearly it was not used for the purpose of describing the estate intended to be conveyed to the grantee by the deed; nor was it intended to describe the estate of which the grantor was possessed, and intended to be passed. Then for what purpose was the sentence inserted in the connection where it is employed? Evidently to express a reservation in behalf of the grantor, and that reservation was an estate for the life of the grantor. The legal effect, then, of the sentence under consideration, as contained in the deed, when considered in connection with other parts of the deed is precisely the same as if the grantor had said in the deed, "And it is further understood that I, Shadrach Hurst, hold a life interest in the above described tract of land." While the deed stands as the act of the parties, parol evidence cannot be received to contradict or control it. This elementary general rule has been applied to the case of reservations in deeds. *Webster v. Webster*, 33 New Hamp. 22; *Swick v. Sears*,

1 Hill (N. Y.) 17; *Noble v. Bosworth*, 19 Pick (Mass.)

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314. In the case last cited, Shaw, judge, in delivering the opinion of the court, says: "It would as well be contrary to the general rule of the common law, which provides that the terms of an instrument in writing shall not be altered or controlled by a parol agreement, as against the provision of the statutes, which requires that all rights and interests in real estate, shall be manifested by some instrument in writing, and that no action shall be brought on any agreement for the sale of land, or any interest in or concerning the same, unless in writing. It is as much against these rules to admit parol evidence, to prevent or restrain the legal inferences and consequences of a deed, as to control and alter its express provisions. *Pattison v. Hull*, 9 Cowen, (N. Y.) 754." See also *Pasley v. English*, 5 Gratt., 141; *Carpenter v. Millard*, 38 Vermont, 16.

It is true that when the language used is susceptible of more than one interpretation, it has been held that courts will look at the surrounding circumstances, existing when the contract was entered into, the situation of the parties and of the subject matter of the instrument; and sometimes when the words are ambiguous the courts will call in aid the acts done under it, as a clue to the intention of the parties. See *French v. Carhart*, 1 Comstock (N. Y.) 109. But in this case the language is not so ambiguous as to admit, or require such evidence to a proper understanding of the meaning of the parties as to the character, quality and extent of the estate intended to be reserved by the grantor to himself. I think it is clear upon full consideration that the plain purpose and legal effect of the deed in question, was, and is, to convey to the grantee, an estate in fee simple to commence on the death of the grantor, and to reserve to the grantor an estate for and during, his life, in the lands; and that parol evidence of acts or declarations of the parties, or either of them, after or at the time of the execution of the deed, to enlarge, explain, restrict or alter the plain legal effect

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of the deed is incompetent, and inadmissible ; and that it was proper for the court to construe and determine the legal effect of the deed and to instruct the jury thereon. And I am of opinion, for the reasons above stated, that the instructions given by the court to the jury, at the instance of the plaintiff in this case were and are, correct, and that the court was right in refusing to give the instructions asked by the defendant. The judgment of the court below must, therefore, be affirmed with costs and \$30 dollars damages to the appellee against the appellant.

The other Judges concurred.

JUDGMENT AFFIRMED.

## CHARLESTON.

## RAILROAD COMPANY v. HALSTEAD.

February 27, 1874.

A report of commissioners, made under section fourteen of chapter <sup>1874.</sup> forty-two of the Code, providing that the party defendant shall January Term. have the liberty of constructing certain easements over the land taken by the Company, is erroneous upon its face, although otherwise in conformity to the statute, and may be set aside on motion of the defendant\*.

An appeal from an order of the circuit court of Fayette county, setting aside a report of commissioners ap-

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\*The following is the section referred to in the above syllabus:

"14. As to each tract, the commissioners, after viewing the same, and hearing any proper evidence which is offered, shall ascertain what will be a just compensation to the person entitled thereto for so much thereof as is proposed to be taken, and for damage to the residue of the tract, beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed, or the purpose to which the land to be taken is to be appropriated, and make report to the following effect: "We, the undersigned, commissioners appointed by the circuit court of \_\_\_\_\_ county, by an order made on the \_\_\_\_\_ day of \_\_\_\_\_, on the application of \_\_\_\_\_, respectfully report that, having been first duly sworn, we have viewed the real estate owned by \_\_\_\_\_, mentioned in the said application, and are of the opinion that \_\_\_\_\_ will be a just compensation for so much of the said real estate as is proposed to be taken by the said applicant, that is to say: (Here describe the part to be taken, so as to identify the same with reasonable certainty, which description may be by reference to a plat annexed to the report, or in any manner that would be sufficient in a conveyance); as well as for damage to the residue of the said real estate beyond the peculiar benefits which will be derived in respect to such residue from the work to be constructed (or from the purpose to which the part to be taken by said applicant is to be appropriated). Given under our hands, this \_\_\_\_\_ day of \_\_\_\_\_."



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pointed under the provisions of chapter forty-two of the Code, to ascertain a just compensation to the appellee, Halstead, the defendant below, for certain land owned by him, situate in said county, which was proposed to be taken by the Chesapeake and Ohio Railroad Company, the appellant here and the plaintiff below, for its uses and purposes. The facts sufficiently appear in the opinion of the Court.

The Hon. Henry L. Gillaspie, judge of said circuit court, presided at the trial.

*Miller & Quarrier* and *Laidley & Hogeman* for the appellant.

*Abram. Burlew* for the appellee.

PAULL, JUDGE :

This was a proceeding on the part of the Railroad Company, under the provisions of chapter forty-two of the Code of West Virginia, for taking so much of the defendant Halstead's lands as they required for their use, in the county of Fayette.

Commissioners were duly appointed to make the appraisal required by law, and on the 24th day of February, 1871, made and signed their report, which was returned to court. At a term of the court held on the 22d day of May, 1872, the defendant Halstead, by counsel, moved the court to set aside said report, for errors appearing on its face. The motion was resisted by the Company, but on argument the same was granted, and the report was set aside. To the order of the court setting aside the report the plaintiff excepted, and from it has taken its appeal to this Court. The report recites that the commissioners are of the opinion that twenty-three hundred and twenty dollars will be a just compensation for so much of the said real estate as is proposed to be taken by the said applicant ; (and further omitting the description of the land) as well as for the damage to the residue to the said real estate beyond the peculiar benefits which will be derived in respect to such residue from

the construction of the said railroad. Thus far the report is in strict conformity with the provision, and even with the form, prescribed by the statute. Had the report stopped there, there would have been no errors upon its face; but the report then proceeds as follows: "Liberty is reserved to said Halstead and his assignees and vendees, at any time, to construct to and under, or by trussel work, over the land, so taken and above described, such horse roads and car ways as may be necessary to the shipment, by water or railroad, of the minerals or other products, of the residue of the said lands of the said John Halstead." Does this last paragraph thus embraced in the language of the report constitute an error upon its face for which the same should be set aside, is the question now submitted to our determination.

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It was expressly held by this Court in the case of *Chesapeake and Ohio Railroad Company v. Robert Patton*, 6 W. Va., 147, that a party is entitled to have the "just compensation," provided for by law, paid to him exclusively in money. The statute does not contemplate the payment to any extent in any other way. The report before us reserves to the defendant the liberty of constructing certain easements over the land which has thus been taken by the Company, and which becomes, under the provisions of the Code, their absolute property. If this reservation was signed by the commissioners to be a part of the compensation to which the party was entitled, either for the land taken or for damages, the report is erroneous.

It has been claimed in argument, however, that the report, being complete and perfect, without this paragraph, and the commissioners having settled a "just compensation" in both these respects, the paragraph should be treated as surplusage and declared a nullity. There is some force in this view; still the language is there, and for aught that we can see or tell, was to constitute a substantial and material part of the report. It is designed to confer additional benefits upon the party,

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besides the just compensation which had been already awarded: for what reason does not appear. If designed to be effective, this paragraph clearly contravenes the provisions of the statute, which gives the Company a fee simple title to the land taken without such an incumbrance, and if not adopted or ratified by the Company, would furnish just ground of exception to the report, on its part. The report, however, must be conclusive on both or neither, of the parties. Regarding the question in this light, the commissioners have clearly transcended their power. We have seen no authority bearing upon this subject, except the case of *Hill and Aldrich v. The Mohawk and Hudson Railroad Company*, 3 Selden, (N. Y.) 152. The statute of New York, under which this case was decided, provided that "the appraisers shall assess the value of the land so proposed to be taken, and the damages the owners may sustain by taking their lands, by injury to buildings, and in the construction of such road, without any deduction on account of any real or supposed benefits which such owner may derive from the construction of such road." Under this provision, the commissioners made their award, with the following statement in their certificate: "This award is based on the supposition, and made on the condition, and with the understanding, that Hill and Aldrich, the owners, are to be at liberty, at any time, to lay out and open a street on the north side of their lot across said road, and to remove any fences or obstructions, to such street, and also to drain under said road, provided that the grade of said railroad is not effected thereby, nor the running, or operation, of said road interfered with or impeded in any way." Without commenting upon the difference that appears in the New York statute from ours, or the difference in the language of the award, still the points of agreement are sufficient to make the principle of that decision, as made by the supreme court of appeals in New York, applicable to the case now under consideration. The language, above quoted, was held to be a

substantive part of the award, and the court say : "It is hardly necessary to affirm that the appraisers had no authority to arbitrate between these parties. In attempting to reserve privileges to the owners by way of easement in the lands they were to appraise, they transcended their powers and their award was a nullity. It has never been suggested that the railroad company would be bound, *ipso facto*, by the award, without some subsequent act, on their part, affirmatory of its provisions, and that the award when made, must conclude both or neither of the parties." We deem it unnecessary to notice the language of the court upon the question of the probable deduction of the value of easements or privileges thus secured to the land owners, from the damages to which they were entitled. In this proceeding, it is undoubtedly true that there must be a substantial compliance with every requirement of the statute, leaving no ground for the suggestion even, that under the cover of the privileges granted, the party may have sustained an injury in another direction. The objection to the report is one appearing upon its face, and being well taken, there was no error on the part of the court below in setting aside the report, and the judgment of the circuit court of Fayette county made on the 22d day of May, 1872, is affirmed with costs and \$30 damages to the appellant, and this cause is remanded to the circuit court of said county to be proceeded in according to law.

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The other Judges concurred.

JUDGMENT AFFIRMED AND CAUSE REMANDED.

## CHARLESTON.

PERRY, USE &amp;C. v. McHUFFMAN.

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1. When the writ and declaration in the cause are against *two* defendants therein named, and the record shows that the "*defendants*" appeared in court, by their attorney, and pleaded in bar to the declaration, and that the "*defendants*" made a motion, at the same time, to the court, in the cause, and afterwards, at another term of court, the record recites "this day came the parties," &c., and judgment is rendered in favor of the plaintiff against the "defendants" it must be taken that the judgment is against the defendants mentioned in the writ and declaration.
2. Where the cause is on the trial docket, whether properly or otherwise, the defendants may appear to it, in court, by attorney, and in person and plead in bar to the action, whether the writ in the cause has been properly executed or not.

An appeal, by Thomas McHuffman, from a judgment of the circuit court of Greenbrier county, rendered against him and Spencer R. Hill in favor of John V. Perry, for the use of Jacob L. Bloom, for the sum of \$273.50, with interest thereon from the date of the judgment, December 8, 1871, until paid and costs. The facts appear in the opinion of the Court.

The Hon. Joseph M. McWhorter, judge of said circuit court, presided at the trial below.

*Adam C. Snyder* for the appellant.

*Samuel Price* for the appellee.

HAYMOND, PRESIDENT :

The writ in this case is against Thomas McHuffman and Spencer, *alias* S. R. Hill, and is made returnable the

first Monday in June, 1869. Upon the writ the sheriff made return in these words: "Executed by giving a copy to Hill." At June rules, which were held on the first Monday in the month, the plaintiff, by his attorney, filed a declaration in the cause, in debt, against both the defendants named in the writ, and took a common order against defendant Hill; and on the first Monday of July, thereafter, the common order was confirmed in the clerk's office. Afterwards, at a circuit court held for the county of Greenbrier, in October, 1869, this entry appears upon the record of the court in this case, viz: "John V. Perry, for, &c., plaintiff v. Thomas McHuffman and S. R. Hill, defendants, in debt. This day came the parties, by their attorneys, and on motion of the defendants, by their attorney, who pleaded payment, to which the plaintiff, by his attorney, replied generally, it is ordered that the judgment obtained in the office be set aside. And, on the further motion of the defendants, it is ordered, that unless the plaintiff in this cause, files with the clerk of this court the affidavit required by law, within sixty days, that this suit be dismissed." Afterwards, at a circuit court, held on the 30th day of December, 1869, this order was made and entered by record, viz: "The defendant having filed the "Suitors Test Oath," it is ordered that unless the plaintiff file the affidavit required by law in thirty days that this suit be dismissed." The next order made and entered of record in the cause, so far as the record before us discloses, is in these words, viz: "At a circuit court held as aforesaid, on the 8th day of December, 1871, the day and year herein written, until which time the cause had been regularly continued at the several intervening terms of the court, this day came the parties by their attorneys, and neither party requiring a jury, the cause was submitted to the court. It is considered by the court that the plaintiff, for &c., recover against the said defendants the sum of \$273.30, with interest from the 8th day of December, 1871, until paid, and his costs here expended." The defendant McHuff-

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man, alone, has appealed from this judgment, to this Court, and he now here, by his counsel, assigns the following as errors in the judgment of the circuit court, to-wit:

"*First.* The defendants were never served with process; the return of the sheriff, if sufficient in other respects (which it is not), shows that the summons had not been executed upon the defendants in this action, or either of them. The defendants could not appear by attorney until they had been duly summoned."

"*Second.* The plaintiff having failed to file the affidavit required by the orders made in the cause on the 25th day of October, and on the 30th day of December, 1869, the action stood dismissed, and the orders and judgments subsequently entered were *coram non judice* and void."

The appellant's counsel, in support of the first error assignee, cited the Court to *Crumpp v. Bennett* in vols. 1 and 2, Littell's Kentucky Reports, and *Moore v. Parker*, 3 (Litt. Ky.) I have examined these cases, and find they do not sustain his proposition. The cases there cited are materially different from the case before us.

A record is truth in contemplation of law. Courts of record speak by means of their record, and the record imports in itself such incontrollable credit and verity that it generally admits of no averment, plea or proof to the contrary. 3 Tho. Co. Litt., 323; *Field v. Gibbs*, Peters (U. S. Cir. Court,) 155; *Calwells v. Shields & Somerville*, 2 Rob. (Va.), 305. Here the entry made at the October term, 1869, after stating the names of each of the defendants in the caption thereto, declares that "on motion of the defendants, by their attorney, who pleaded payment," &c. "And on the further motion of the defendants, it is ordered," &c. If this record speaks the truth, then the defendants appeared before the court, by their attorney, and personally also, and this must be taken as true. Where a cause is on the trial docket, whether properly or improperly, the defendants may

appear in court, to it, by attorney, or in person, and plead in bar to the action, whether the writ in the cause has been properly executed or not; and though the cause is improperly placed on the trial docket. This course is often pursued and recognized in practice by the courts. In 1 Salkeld, 86, the court of King's Bench decided 'that an attorney's consent binds the client, though contrary to his express orders; and, in another case, on the same page, chief justice Holt said: 'The course of this court is *when the attorney takes upon himself to appear*, the court looks no further, and leaves the party to an action against him.' "No warrant of attorney is known among us; counsel deal with counsel, as authorized in those cases in which they assume to act. The courts act upon this supposition also. It is our usage." The word "defendants," as employed in this order must be intended to be the defendants named in the declaration and writ in the cause, and not one of them: And also of the order of court of the 30th day of December, 1869. The words "parties" and "defendants" employed in the judgment of 8th day of December, 1871, must be intended to mean the plaintiff in the action and the defendants who had appeared in court, by their attorneys, and plead at a former term. The first error assigned is overruled as not being well taken.

The second error is not well taken, because the record of the judgment of the 8th of December, 1871, declares that the cause had been regularly continued, at the several intervening terms of the court, and the case was "submitted to the court" by the parties, for trial, without objection. "The Suitor's Test Oath," which the order of December, 1869 states is filed, is not disclosed by the record, and, under the circumstances, and the declaration and recitals of the judgment of December 30, 1871, this Court would be authorized, if necessary, to sustain the judgment of the court below to presume that the plaintiff did file the affidavits required by the orders of court of October and December. *Perkins' Admr. v.*

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*Hawkins' Admx.* 9 Gratt., 649. The order of October, 1869, does not specify or declare what subject or matter is required to be stated in the affidavit. As framed, the order simply requires nothing to be done by the plaintiff. The order of December 30, 1869, is not quite so indefinite as the previous order, still it is subject to just criticism for want of certainty. But these "Suitors' Test Oath" laws, as they are sometimes called, have been declared to be unconstitutional by this Court, and the Legislature, early in 1870, repealed them, without reservation, and it is unnecessary to say more of them here.

For the foregoing reasons the judgment appealed from must be affirmed with costs and damages, according to law, to the appellees.

The other Judges concurred.

JUDGMENT AFFIRMED.

## CHARLESTON.

## JAMESON v. MYLES' EXOR.

February 27, 1874.

M., deceased, in his lifetime and at his death, was the owner of personal and real property, in Greenbrier county, in this State; and <sup>1874.</sup> January Term. at his death he was indebted in an amount so large that it was doubtful whether his real and personal estate were, together, sufficient to pay his debts. Sometime prior to his death he made and published his will, in due form; which was, after his death, in the year 1867, duly proven by the subscribing witnesses and admitted to record in said county. The first, second, third and fifth clauses of the will are in these words, viz:

*"First.* I direct that Richard H. Gillilan be my executor until my oldest son, Aquilla Myles, becomes twenty-one years of age then I direct that he be associated with said Gillilan, and that they jointly act in the management of my affairs.

*Second.* I direct that my business be carried on in the same manner that it would be, provided I were living, by my executors, for the term of eight years after my decease; that my sons all remain and work together until that time, in order that they may may pay all the debts against my estate, with the understanding that each receive, in the division to be hereafter named, a fair compensation for their labor, from the time they are twenty-one years of age up to the expiration of the eight years above named. My daughter Emily Myles, to remain in the family, as one of the same, until the expiration of the time above mentioned, provided she does not marry, but to receive no compensation for her services other than her sustenance.

*Third.* I empower my executor or executors, to collect all money due me and apply to the payment of my just debts; and should my creditors be not willing to wait until the money can be made and collected, I direct my executor or executors, to give a lien on my lands, or so much thereof as may be necessa-

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ry, in order to prevent suit being brought on my debts and costs added thereto. If my creditors will not wait, I direct that so much of my lands be sold as may be required to satisfy the same.

*Fifth.* At the expiration of the eight years above named, I direct that my property, of all kinds, be divided equally among my daughter and all my sons, taking into consideration the wages due those who have arrived at twenty-one years of age previous to this time, as above provided for; hereby revoking all other wills and decrees by me made."

Gillilan qualified as executor, at the time the will was admitted to probate. Afterwards, in the year 1868, and before G. had made any settlement of his executorial account, J. filed his bill in the circuit court of Greenbrier county, claiming that he was the owner, by assignment, of two bonds executed by M., the 5th day of December, 1859, to C., and payable on demand, for \$500 and \$492, respectively, which were still due and unpaid; but he does not make an exhibit of the assignment or prove it, or expressly allege who assigned the bonds to him; and alleging that it was doubtful if the real and personal estate of M. were together sufficient to pay his debts: And praying that the executorial account of G. be settled, and that the creditors of M. be convened before a commissioner of the court and that their debts be ascertained and reported. The executor and children of M. were the only party defendants to the bill, some of whom were infants. Afterwards, the cause was, by decree regularly made, referred to commissioners, for the purposes prayed in the bill. While the cause was before the commissioner, K. appeared before him and claimed that the estate of M. was indebted to him in the sum of \$6,000, and that the same constituted a lien, for its payment, first in priority, upon a certain tract of the land of decedent, and the commissioner, from the evidence before him, reports these facts in relation to said claim, viz: "Some of the creditors of Myles insisting on the payment of their debts, and the executor having no funds to meet the demands, he did, on the 29th day of March, 1862, borrow of K. \$4,140, of which about \$600 was in bank notes and the remainder in Confederate money. He also took up a bond executed by Joseph Myles to K. on the 15th of March, 1861, for \$1,750.90, which, with the interest thereon and the money borrowed, amounted, on the 29th of March, 1862, to the sum of \$6,000, for which said G. executed to K. his bond as executor of M. G., executor, to secure the payment of his bond, executed a trust deed upon a tract of land belonging to the estate, situated on Anthony's creek, he understanding himself to be authorized so to do by the will." "The Confederate money was worth at the time of the loan seventy-seven cents in gold-per dollar." It is proved that the executor applied the whole of

the money borrowed of K. to the payment and extinguishment of certain of the debts of M., and that the debts of M. were thereby extinguished to the amount of money so borrowed. — **Held:** 1874.  
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1. That, under the circumstances, it is proper and just that K. should be allowed, as against the estate of M., his original debt of \$1,750.90, \$600 for the bank notes, with their interest, and at least the gold value of the Confederate money at the time it was loaned.
2. That K. did not acquire, by virtue of the deed of trust, the right to have his said debt against the estate of M. satisfied out of the proceeds of the sale of the tract of land in the said deed mentioned, in preference to the other creditors of M.
3. It is error to confirm the report of the commissioner of the court allowing J. the debt claimed by M. in his bill, and direct the same to be paid by G., the executor, to J., without C., the obligee in the two bonds, being first made a party to the cause.\*

Appeal, by Alexander Kearns, from a decree of the circuit court of Greenbrier county, made and entered on the 29th day of June, 1870, in a certain suit in chancery therein pending, wherein David Jameson was complainant and R. H. Gillilan, executor of Joseph Myles, deceased, Emily Myles, Erasmus Myles, Turpin Myles, Joseph Myles, and the following infant heirs at law of said Joseph Myles, deceased, were respondents, to-wit: Harlow Myles, Augustus Myles and Edward Myles. The said Kearns was creditor of the estate of the said

\*The following is the act referred to in the opinion of the Court:

"1. That in any action or suit or other proceeding for the enforcement of any contract, express or implied, where such contract was for the sale or purchase of any real or personal property, made or entered into between the first day of May, 1861, and the first day of May, 1865, it shall be lawful for either party to show by parol or relevant testimony, what was the true understanding and agreement of the parties thereto, either express or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed, or with reference to which, as a standard of value, it was made or entered into; and in an action at law or suit in equity it shall be necessary to plead the agreement specially, in order to admit such evidence.

"2. Whenever it shall appear that any such contract was according to the true understanding and agreement of the parties, to be fulfilled

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Myles, and, as such, his claim was proved and allowed, in part, by the commissioner appointed to take an account below. From said decree, which established the priorities of the creditors of the said Myles, deceased, which the said Kearns, for error on that account, and for other errors, alleged, was erroneous, he took this appeal. The facts in the case sufficiently appear in the opinion of the Court.

The Hon. Joseph M. McWhorter, judge of said circuit court, presided at the hearing below.

*Samuel Price* for the appellant Kearns.

*Mathews & Mathews* for Myles' executor.

HAYMOND, PRESIDENT :

The plaintiff filed his bill on the first day of March, 1868, in the circuit court of the county of Greenbrier, against the executor and children of Joseph Myles, deceased, in which it is alleged, that plaintiff is the owner of two bonds executed by Myles to Joseph H. Correll for the purchase money of a tract of land, both dated December 5, 1859, payable on demand, one for \$500, the other for \$492, and assigned to him ; that Myles, before

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or performed in Confederate States treasury notes, or Virginia treasury notes, or was entered into with reference to such notes as a standard of value, the same shall be liquidated and settled by reducing the nominal amount due or payable under such contract in Confederate States treasury notes or Virginia treasury notes, to its true value at the time they were respectively made and entered into, or at such other time as may to the court, or, if it be a jury case, to the jury, seem right in the particular case, and upon the payment of the value as ascertained, the party bound by such contract shall be forever discharged of and from the same, provided that in all cases where actual payment has been made of any sum of such Confederate States treasury notes, or Virginia treasury notes, either in full or in part, of the amount payable under contract, the party by whom or for whom the same was paid, shall have full credit for the nominal amount as paid, and such payment shall not be reduced. And if any debt payable in coin, or its equivalent, by a principal debtor has been paid by the security for such debt, under and by virtue of a judgment against such security, or other demand for payment upon such security, so that such payment shall operate as a discharge of the principal debtor from his original obligation under the provisions of this act, in any controversy between such security so paying and the principal debtor, the mode of payment by such security shall not be inquired into."

his death, made and published his last will and testament, which, after his death, was duly proven and admitted to probate in the county of Greenbrier; that by the will Richard H. Gillilan was appointed executor thereof, and that he qualified and is acting as such; that Myles was seized of considerable real and personal estate; but his personal property is insufficient to pay his debts and it is doubtful whether the whole of his estate, real and personal, will be sufficient to pay his debts; that there are many debts unpaid, and the executor has not settled his executorial account; that part of the children of Myles are infants, &c. The bill prays that the executor be required to settle his executorial account before a commissioner of the court, and that the commissioner be required to report all the debts against the estate of the decedent—that the real estate of the decedent, so far as necessary, be appropriated to the payment of his debts, &c. An official copy of the will of decedent is filed in the cause. The infant defendants answered by guardian *ad litem*. The answer is formal, and prays that the court protect the interests of the infants. The adult defendants failed to answer the bill, and, on the 6th day of August, 1868, the cause was regularly heard upon the bill taken *pro confesso*, as to the adult defendants, exhibits and upon the answer of the infant defendants by their guardian *ad litem*. And the court decreed that the executor render his account as such before D. C. B. Caldwell, one of the commissioners of the court, and that the commissioner, take, state, and report an account of the indebtedness of the decedent and that to enable him to do so, before taking the account, he convene the creditors, by publication, &c. Another order was made in the cause on the 20th of June, 1870, not material to be further noticed here, so far as we can see from the record presented. Commissioner Caldwell made and filed his report and from the part of which is copied into the record it appears that “some of the creditors of Myles insisting on the payment of their debts, and

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the executor having no funds to meet the demands, he did, on the 29th day of March, 1862, borrow of Alexander Kearns \$4,140, of which sum about \$600 was in bank notes and the remainder in Confederate money. He also took up a bond, executed by Joseph Myles to said Kearns, on the 15th day of March, 1861, for \$1,750.90, which, with interest thereon, and the money borrowed, amounted, on the 29th of March, 1862, to the sum of \$6,000.00, for which Gillilan executed to Kearns his bond, as executor of Myles. Gillilan, to secure the payment of this bond, executed a trust deed upon a tract of land belonging to the estate on Anthony's creek, he understanding himself to be authorized so to do, by the will." The appellant appeared before the commissioner and presented his claim for \$6,000 with interest and proved the above facts. He not only claimed the full amount of the \$6,000.00, with interest, but he also claimed and now claims, that the \$6,000.00 with its proper interest, by reason of the deed of trust made by the executor, constitutes a valid lien first in priority, upon the tract of land in the deed of trust mentioned. It was proven before the commissioner that the executor applied all the money, so borrowed by him from appellant, to the payment of certain just debts, existing against the estate of Myles. Under this state of facts the commissioner rejected the \$6,000.00 bond claimed by Kearns and allowed to him in his report only the \$1,750.90 of his claim, with interest thereon to the 29th of June, 1870, amounting to \$976.38. The appellant (Kearns) filed exceptions to the commissioner's report, by which he insists that the commissioner erred in rejecting his claim for \$6,000.00, and that the commissioner erred in allowing him only \$1,750.90, of his claim. On the 29th day of June, 1870, the cause was further heard, by the court, upon the papers formerly read and report of commissioner Caldwell with the exceptions of defendants R. H. Gillilan and of Alexander Kearns thereto, and depositions accompanying the report. And the

court in and by its decree, sustained part of the exceptions of appellant (Kearns) and allowed him of his claim \$1,750.90, original debt, and the interest thereon to the 29th of June, 1870, \$976.38; and \$600.00 bank notes and interest thereon to same date \$297.00, making an aggregate sum of \$3,624.28 with interest from the 29th day of June, ascertained and deemed by the court to be justly due to Kearns. The other exceptions were overruled by the court, and the report of the commissioner confirmed, except as above stated. The court, by this decree, directed the defendant Gillilan to proceed to pay said debts in the order they are reported, first paying the costs of the suit, the preferred debts to be paid ratably, and the *non* preferred debts the same. The same decree further directs, because of its appearing from the report that the assets in hand will not be sufficient to pay the debts, that Gillilan (the executor) sell so much of the remaining real estate, on a credit (except sufficient to pay costs of sale, which is to be paid down) as will pay the debts reported, including the plaintiffs debt, &c. From this decree an appeal has been allowed Kearns to this Court. And the appellant, assigns the following grounds of error in the decree:

*“First.* Because the court did not allow the whole bond of \$6,000. It was all used in paying debts.

*“Second.* Because the court did not sustain the deed of trust and give him preference over all other creditors, so far as the trust property was concerned.

*Third.* Because the court did not, at least, allow the gold value of the Confederate money, and other errors upon the face of the record.”

For convenience, the *first* and *third* special assignments of error will be first considered, and together.

From the report of the commissioner, and the evidence, it is manifest that it was right and just to allow the appellant (Kearns) the items before stated amounting in the aggregate to \$3,624.28. The whole amount of the

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claim of the appellant was allowed by the court, except \$3,540, the face amount of the Confederate money loaned by the appellant to the executor, and for this the court refused to allow any amount. The report of the commissioner shows that the gold value of the Confederate money at the time the executor received it was seventy-seven cents per dollar, and the evidence establishes that the executor applied the Confederate money to the payment of certain of the creditors of the decedent to the full amount thereof, and that debts against the decedent's estate to that extent were extinguished. Thus it is seen that the estate of the decedent, and creditors of the estate have been benefitted by, and to, the amount of the Confederate money, certainly to the amount of its gold value. The gold value of the Confederate money was, at the day it was received, according to the report of the commissioner, \$2,726, and the interest on the same to the 29th of June, 1870, is \$1,376.63, making an aggregate sum of \$4,102.63, which should, at the least, have been allowed the appellant, by the commissioner and circuit court, to bear interest from the 29th day of June, 1870, in addition to the sum of \$3,624.48, with interest, which was allowed by the circuit court. That the appellant should, under the circumstances of this case, be allowed at least the gold value of the Confederate money, is clearly just and equitable, and in accordance with the principles established in the case of *Thorington v. Smith*, 8 Wall, (Sup. Ct. U. S.) and also the act of the Legislature of this State, passed at the adjourned session held in 1873. The first error assigned by appellant under this view is overruled, but the third error assigned is sustained.

The *first* clause of the will of Myles appoints Gillilan executor. The *second* and *third* clauses are as follows, viz:

"*Second.* I direct that my business be carried on in the same manner that it would be provided I were living, by my executors, for the term of eight years after my de-

cease ; that my sons all remain and work together until that time, in order that they may pay all the debts against the estate, with the understanding that each receive, in the division to be hereafter named, a fair compensation for their labor from the time they are twenty-one years of age up to the expiration of the eight years above named ; my daughter Emily Myles to remain in the family as one of the same until the expiration of the time above mentioned, provided she does not marry, but to receive no compensation for her services other than her sustenance.

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*“Third.* I empower my executor or executors to collect all money due me, and apply it to the payment of my just debts, and should my creditors be not willing to wait until the money can be made and collected, I direct that my executor or executors give a lien on my lands, or so much thereof as may be necessary in order to prevent suit being brought on my debts, and costs added thereto. If my creditors will not wait, I direct that so much of my lands be sold as may be required to satisfy the same.”

The will is dated the 11th day March, 1861, and was admitted to probate April 9th, 1867. The twenty-fifth section of the one hundred and thirtieth chapter of the code of Virginia of 1860, which was in force in Virginia at the date of the will, and has continued to be law in this State since its formation, provides how the assets of a decedent, in the hands of his personal representative, after the payment of funeral expenses and charges of administration, “shall be applied,” where such assets are not sufficient for the satisfaction of all demands against him.

*First.* To debts due to the United States.

*Second.* Taxes and levies assessed upon the decedent previous to his death.

*Third.* Debts due as personal representative, guardian or committee where the qualification was in this State in

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*Fourth.* All other demands ratably, *except* those in the next class. And

*Fifth.* Voluntary obligations.

The third section of the one hundred and thirty-first chapter of the Code of Virginia of 1860, and the Code of West Virginia of 1868, provide that "all real estate of any person who may hereafter die, as to which he may die intestate, or which, though he die testate, shall not by his will be charged with or devised subject to the payment of his debts, or which may remain after satisfying the debts with which it may be so charged, or subject to which it may be so devised, shall be assets for the payment of the decedent's debts, and all lawful demands against his estate, in the order in which the personal estate of a decedent is directed to be applied." If a testator could, by will, authorize his executor to make a preference among his creditors in the application of the assets other than that directed by law, (which is not here determined) it is manifest by the second and third clauses of the will of Myles, that he did not mean or attempt to give such authority to his executor. It is clear by the second clause of the will that it was not his wish that his lands should be sold or incumbered with liens by his executor, but that his debts should otherwise be paid. Especially is this so, when that clause is read in connection with the third and fifth clauses. The fifth clause directs that "at the expiration of the eight years, above named, my property of all kinds be divided equally among my daughter and all my sons," &c. His wish was that his lands should be held and enjoyed by his children, and his debts be paid within the eight years, otherwise than by resorting to the lands; but if his creditors should not be willing to wait until the money could be made and collected, as

he wished, then, in that event, he directs his executor to give a lien on his lands, or so much thereof as should be necessary, on time, for the equal benefit of all his creditors to prevent suits being brought and to save costs, and not for the benefit of a part of his creditors only. But if his creditors would not give time or wait, if the lien was given, then in that event he directed that so much of his lands be sold as should be required to pay all his debts. This was clearly the meaning and purpose of the testator in this case. Powers were conferred, or attempted to be conferred, upon the executor, touching the lands, to be exercised only upon the happening of certain contingencies named. Under the circumstances the deed of trust made by the executor for the benefit of the appellant on the parcel of land therein mentioned should not be construed to constitute a lien or give priority to plaintiff, for his debt over and above the creditors of the fourth class, mentioned in the law, to which reference has been made, but he should be paid equally with creditors of that class. The appellant's *second* assignment of error is therefore overruled.

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It does not appear that Joseph H. Correll, the person to whom the two bonds against Myles, in the plaintiff's bill mentioned, was made, or is, a party to this suit. The plaintiff claims these two bonds by assignment. But he does not refer to the bonds as exhibits filed with his bill, nor does he allege expressly that Correll assigned them to him; and he does not set out the assignment or even aver that it was for value. He describes the bonds by stating their dates, amounts and when payable, and simply says they were assigned to him, and that he is the owner of them. The bonds do not even appear in the record; nor is there any assignment of the bonds appearing in the record or proof thereof. Before a special court of appeals in Virginia consisting of Brooke and Cabell, judges of the court of appeals, and Scott, judge of the general court, it was *held* that, "In

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every case of a bill in equity, asking relief for the plaintiff, as assignee of the rights of another, the assignor must be made a party, &c. *Corbin v. Emerson*, 10 Leigh, 663. In the cases of the *James River and Kanawha Company v. Littlejohn* and *Littlejohn v. Ferguson*, 18 Gratt. 53, it was held by the court of appeals of Virginia that "to a bill filed by an assignee of a chose in action, if the assignment purports to transfer the whole interest of the assignor, and there is nothing in the pleadings and proofs to induce the belief that it did not really do so, the assignor is not a necessary party. In the last named case the assignor was made a party defendant in the writ, but not in the bill, and there was an order of publication executed as to him. The bill of the assignee alleged that on the 8th day of February, 1859, J. C. Robinett (the assignor) was indebted to him, in the sum of \$783.45, and on that day executed to the plaintiff his note for the amount, payable on demand; and at the same time drew an order on the James River and Kanawha Company, who were indebted to him, as a contractor on their canal, for the amount of the note, with interest from its date; which note and order were made exhibits with the bill. The order was the assignment. The defendants were all adults. The case under consideration is widely different from that last cited. In this case there are interested infant defendants—the assignment is not set out or exhibited or proved. It may not in all cases whatsoever be true that an assignor is an indispensable party. Still it is evident from the authorities that there are many cases where it is essential. This is evident, according to the opinion of the court delivered by judge Joynes and the cases therein cited, in the case in 18 Grattan, before referred to. From what has gone before it is apparent that it was error in the circuit court to confirm the report of the commissioner, and direct the debt claimed by the plaintiff, in his bill, or any part thereof, to be paid by him, without the obligee first being made a party.

For these reasons the decree of the circuit court of Greenbrier county, rendered on the 29th day of June, 1870, must be reversed and the appellant recover his costs about the prosecution of his appeal here expended. And this Court proceeding to render such decree as the court below ought to have rendered, it is adjudged, ordered and decreed that this cause be remanded, to the circuit court of Greenbrier county for further proceedings therein to be had, according to the principles announced in this opinion and the rules governing courts of equity in such cases, with leave to the plaintiff to file an amended bill making Joseph H. Correll a party to this suit and such other persons as may be proper.

The other Judges concurred.

DECREE REVERSED AND SUIT REMANDED WITH  
LEAVE TO AMEND.

## CHARLESTON.

WHITE v. HEAVNER, SHERIFF, AND ASSUCH, ADMR.

February 27, 1874.

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1. When an assignor and assignee of a chose in action are both parties to a suit brought to recover the money due upon such chose in action, and the debtor is not living, the assignor is incompetent to testify as a witness in such suit in favor of his assignee.
2. And in such case a release, made by the assignee to the assignor, from all and every liability to recourse or otherwise, as assignor of the chose in action, does not make the assignor a competent witness to testify in favor of his assignee.
3. The death of a debtor whose real property in this State has been attached in a suit in equity, and proceeding therein by attachment against him and his estate as a non-resident, does not dissolve the attachment or lien thereon, where the death occurs after the attachment is levied.

This is a sequel to the case of *Middleton Exor. v. White*, reported in 5 W. Va. 572. After the suit was reinstated in the circuit court of Greenbrier county, the plaintiff retook the deposition of Charles A. Stuart, his assignor, he having, by his writing under seal, released the said Stuart from all liability, on account of such assignment. At the hearing below, the court was of opinion that the said Stuart was then, by reason of such release, free from objection and a competent witness in the suit, and therefore the court proceeded to render judgment in favor of White, for the amount claimed by him, with interest, and to decree a sale of certain real estate of the estate of Middleton, should the judgment remain unpaid for a certain period, and appointed a commissioner to carry the same into effect.

Another question arose as to the dissolution of the attachment that had been sued out in the case and levied upon certain real estate of Middleton, by reason of the death of said Middleton.

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The appeal was taken by J. W. Heavner, sheriff of Upshur county, and as such admr. of Henry O. Middleton, deceased, from the decree rendered on the 9th day October, 1872, and the record, here, shows White was plaintiff and Middleton's admr. and others, whose names were not given, were the defendants to the suit.

The Hon. Joseph M. McWhorter, judge of said circuit court, presided at the hearing below.

*Robert F. Dennis* for the appellant.

*Mathews & Mathews* for the appellee. .

HAYMOND, PRESIDENT :

This cause was before the Supreme Court of Appeals of this State heretofore, on appeal, and the errors then presented upon the record were determined. The Supreme Court of Appeals reversed the decree rendered in the circuit court in favor of the plaintiff, and remanded the cause to the circuit court for further proceedings. One question determined on the former appeal was that Charles A. Stuart, who is a party to the cause, and the assignor of the plaintiff of the choses in action, set up in the bill against Henry O. Middleton (who died soon after the filing of the bill) was an incompetent witness in behalf of his assignee under the provisions of the twenty-third section of chapter one hundred and thirty of the Code of this State. Since this decision, and after the cause was remanded to the circuit court, the plaintiff has retaken the deposition of Stuart, his assignor. Stuart filed with his deposition a paper writing under seal, executed and delivered by the plaintiff to him some short time prior to the taking of his deposition, releasing and acquitting Stuart from all and every liability, to recourse or otherwise as assignor of the bond and fee bills in the bill mentioned, and claimed. The defendants filed written



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exceptions to the reading of the deposition, "because the assignee of a chose in action cannot release the assignor, so as to make him a competent witness, the debtor being dead. The circuit court of the county of Greenbrier, in which the cause was pending, at the October term, 1872, thereof overruled, the defendant's exception, in and by its decree then made, for the reason, as stated in the decree, that it appears that the said deposition of Stuart is free from the objections made to his former deposition in the cause, as his liability as assignor to the plaintiff White has been fully released. And the circuit court, in the same decree, then proceeded to decree against the administrator of Henry O. Middleton, deceased, for the amount of the debt claimed in the bill, and that unless the administrator pays the debt, and costs of suit, within a stated time, that the real property upon which the attachment sued out in the cause against the decedent in his lifetime was a lien, be sold at public auction, &c. This decree is substantially the same as the decree heretofore reversed, except in so far as it states as to the competency of the assignor Stuart to testify by reason of the release. It is apparent that the decree, in so far as it ascertains the amount of the debt, is, for much the larger part thereof, based upon the evidence of Stuart, and that the mind of the chancellor must have been materially influenced thereby. The last deposition of Stuart is substantially the same as his former deposition, and there have been no other depositions or exhibits filed in the cause touching the merits, since the former reversal. The only question presented to us by the record now here, that was not presented by the record upon the first appeal, is whether the release of the plaintiff made to Stuart, the assignor, made him competent to testify as a witness on behalf of his assignee, the plaintiff. To determine this question correctly, it is necessary to recur to the provisions of the Code, which have been in force since the first day of April, 1869, bearing upon the subject. The twenty-second section of chapter one hun-

dred and thirty of the Code provides "that no person, offered as witness, in any civil action, suit or proceeding shall be excluded by reason of his interest in the event thereof." By this provision, it is obvious that it was the purpose of the Legislature that a person offered as a witness in a civil suit or proceeding, should not be excluded merely because of a pecuniary interest in the result of the suit; but on the contrary, that he shall be heard, if he is not otherwise incompetent, and such weight given to his testimony as under all the circumstances, it is entitled. But the twenty-third section of the same chapter provides that a party to a civil action, suit or proceeding, may be examined as a witness in his own behalf, or in behalf of any other party, in the same manner, subject to the same rules of examination as any other witness, except as follows:

"An assignor of a chose in action shall not be examined in favor of his assignee, unless the opposite party be living." The words "opposite party" as here used, must be intended to embrace the debtor, otherwise they would, to a great extent, defeat its evident object, if not altogether the provision. Under this provision it is not a mere pecuniary interest in the result of the suit that makes the person offered incompetent to testify. It follows that as it is not the mere pecuniary interest of the witness in the result of the suit that renders him incompetent, under this provision; the release of such interest cannot render him competent. Here, as already stated, the witness Stuart is a party to the suit and is the assignor of the plaintiff of all the choses in action set up in the bill, against Henry O. Middleton, in his life, and since his death against his personal representative and legal heirs—his deposition is taken by his assignee after the death of Middleton (the debtor), and his testimony is altogether in favor of his assignee. The release of Stuart, the assignor by the plaintiff (the assignee), from liability on account of the assignment of the choses, did not make him a competent witness.

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Under this view of the law the exception of the defendants to the deposition of Stuart, last taken, should have been sustained by the circuit court, and his deposition excluded, as well as the first.

The death of Henry O. Middleton, the debtor, after the attachment was levied on the real property, did not dissolve the attachment or the lien thereof, upon the realty attached.

For these reasons the decree of the circuit court of the county of Greenbrier, rendered in this cause on the 9th day of October, 1872, must be reversed with costs to the appellant, against the appellee White. And the cause must be remanded to the circuit court for further proceedings therein to be had according to the principles announced in this opinion and the rules governing courts of equity in such cases.

The other Judges concurred.

DECREE REVERSED AND SUIT REMANDED.

## CHARLESTON.

## McCLUNG v. LIVESAY.

February 27, 1874.

1. In a bill, filed to restrain the collection of taxes [for school purposes, in a certain township, the plaintiff must aver that he sues, not only on his own behalf, but, also, on behalf of all others, similarly situated. Such averment is essential to a complete determination of all the rights affected by the suit. 1874.  
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2. The general allegation of irreparable injury is not sufficient, without some equitable circumstances be shown,—as insolvency, impediment to a judgment at law, or to adequate legal relief, or a threatened destruction of the property, or the like.
3. The want of such allegation is sufficient ground for dismissing the bill.

This was an appeal, by the complainants, from a decree of the Greenbrier circuit court, in a suit in chancery therein pending, wherein Samuel McClung, Samuel B. McClintic, S. C. Beard, Andrew Beard, William R. Stuart, John M. Sydenstricker, Samuel Pollock, Thomas L. Feamster, John Stuart, William H. Shields (for S. C. Ludington,) William Snyder, Margaret P. Callison, Austin Handley, Harvey Handley, R. R. Dickson, Mason Mathews, Mathew Arbuckle, John A. Welch, Thomas W. McClung, H. F. Dickson, Elizabeth McClung, Abram Bright, Alex. W. Arbuckle, B. F. Harlow and Caroline Hunter, were complainants, and Allen Livesay, John Yates, Oscar Callison, and James W. Jackson, treasurer of Big Levels township, in said Greenbrier county, were respondents.

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On the 30th day of January, 1871, the complainants filed their bill in this suit, praying for an injunction, in the usual form, against the collection of certain taxes hereinafter set forth, and alleging that they were taxpayers in said Big Levels township; that on the — day of —, in the years 1866, 1867, 1868 and 1869, the said Livesay and Yates, claiming to be the Board of Education of said township, had attempted, in each of those years, to levy — cents on each hundred dollars worth of property, taxable in said township, to raise a fund, as they alleged, for the support of primary schools in said township; that on the — day of —, 1870, the said Livesay, Yates and Callison, claiming and pretending to constitute said Board, attempted to levy another tax of twenty-five cents on each hundred dollars' worth of taxable property in said township, to raise a fund, as they alleged, for the support of primary schools therein, for the year 1870; that in virtue of the said proceedings, relating to said levies, the said Jackson, treasurer, as aforesaid, was proceeding to collect divers sums of money from the several complainants, naming them, and the sums said Jackson was so attempting to collect, from each of them; "that the said Livesay and Yates, and the said Livesay, Yates and Callison were never legally elected the school commissioners of said township, and never qualified by taking the oaths, according to law, and could not, and did not, constitute a legal board of education at the times the said alleged levies were made, and that all their acts as such Board of Education, were illegal and void; that the voters of said township did not assent to said several levies, and that in fact a large majority of said voters were opposed to the same; that the said Jackson was never legally elected such treasurer,—never qualified by taking the oath, and never gave the bond required by law; that if the said levies are collected the complainants will be greatly and irreparably injured, and that the said Jackson, as such treasurer, was about to levy and sell the property of the com-

plainants, for the taxes so levied, and that he had already made such levies." The bill concludes with the usual prayer in such cases.

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At the March rules, 1871, the respondent Yates, alone, answered, setting forth, at considerable length the facts relating to the elections for school commissioners, in said township, for the years aforesaid, their qualification, or failure to qualify, the mode and manner in which the levies were made for the years aforesaid, and sustaining his averment by official copies from the proper records, of such elections and levies; but, in the view taken by this Court, it is unnecessary to set forth these facts, at any more length.

The complainants replied, specially, to the answer of Yates, alleging that the same was uncertain, insufficient and untrue, and referring to the record book of the Board of Education of said township, as an exhibit with said replication.

On the 18th day of March, 1871, the cause came on to be heard, in vacation, on the bill, answer, exhibits and motion to dissolve, of which notice had been theretofore given. The judge declined to dissolve the injunction at that time, being of opinion that informalities might exist in the appointment and qualification of some of said officers, and in the manner of laying part of the levies, yet there was not sufficient ground to inhibit the collection of said levies; and it then appearing to the court that the official bond of said Jackson was deficient as to the amount of the penalty, it was ordered, &c., that the said injunction should stand dissolved whenever the said Jackson, as such treasurer, should execute bond in the penalty of three thousand dollars, conditioned according to law, to be approved according to law; or when ever the said Jackson, should he fail to execute such bond, should file with the late Board of Education of said township, a list of the taxes levied, as aforesaid, with the sheriff's receipt therefor—all of which the said Jackson

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was required to do within thirty days from the date of such decree.

Subsequently, an attachment, for failing to comply with said decree, was awarded against the said Jackson, to which he appeared and answered, and he was discharged at his costs.

On the 3d day of October, 1871, the court, on motion of the defendants, dismissed complainants' bill with costs to the defendants, and from this order the complainants have appealed.

The Hon. Joseph M. McWhorter, judge of said circuit court, presided at the hearing below.

*Mathews & Mathews* for the appellants.

*William P. Rucker* for the appellees.

MOORE, JUDGE :

From an order of the circuit court of Greenbrier county, dismissing the bill of the plaintiffs, this appeal has been taken.

The object of the bill was an injunction restraining the collection of taxes ; a subject matter not always welcome in the forum of chancery, and admissible only upon the showing of such special circumstances as clearly indicate that there is not an adequate remedy at law. *Non intervention* with the speedy collection of taxes is the general rule adopted by courts of equity, upon the plain principle of public policy. Taxation furnishing the means of supporting the government, in all its departments, and for the maintenance of the institutions of learning and asylums for the helpless, renders necessary a strict adherence to the rule, unless productive of peculiar or irreparable injury, or must lead to a multiplicity of suits. The matters of complaint in taxation generally resolve themselves in *torts*, or simple questions of trespass, having ample remedy at law ; and, therefore, when a plaintiff seeks the *extraordinary* power of equity,

by way of injunction, the court will look with critical eye, not only to the character in which the plaintiff sues, but also, to the allegations of the bill.

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Such strictness is necessary to prevent usurpation of jurisdiction, and the non-observance of it has occasioned the seeming conflict of decisions.

It is a principle of practice well established that, in a case like the one now under our consideration, where all the tax-payers of the township have a common interest in the subject matter, although their individual interests may be several and distinct, the plaintiff must aver that he files his bill in behalf of himself and all others of similar interest; and where some of the tax-payers file such a bill, they must make a similar averment. Upon this rule of practice, judge Davies, in the case of *Wood v. Draper*, 24 Barb. (N. Y.), 187, has collated the leading authorities, showing it to be an imperative rule, and essential to a complete determination of all the rights affected by the suit. I refer to this decision especially, because made in a case famed for the ability with which it had been argued, and also because it reviews the leading authorities. The same principle and rule of practice is laid down in the case of *Bull and Read*, 13 Gratt., 78. The object of the rule is to settle the rights of all persons similarly situated, and thus prevent a multiplicity of suits.

Now, in the case before us, the plaintiffs have filed the bill for themselves alone. The interests and rights of all others similarly situated in the township would not be determined by this suit. Their interests might be, however, injured by it, and all such persons are therefore necessary parties.

For the protection of the defendants against a multiplicity of suits, where the bill shows a *prima facie* case against them, courts have permitted the plaintiffs to amend their bill, in that respect, before the interlocutory injunction was acted upon; and it has been allowed even after motion to dissolve. As this bill is defective in that



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respect, and it not appearing to have been amended, the court below, upon the precedents cited in *Wood v. Draper*, properly dismissed it.

The face of the bill, without that averment, presents merely a question of *tort* for which equity ought not to interpose. The general allegation of irreparable injury is not sufficient without some equitable circumstances be shown, such as insolvency or impediment to a judgment at law or to adequate legal relief or a threatened destruction of the property or the like. *Burnett v. Whitesides*, 13 Cal. 156.

The decision of the court below should be affirmed with costs and damages.

The other judges concurred.

DECREE AFFIRMED.

NOTE BY THE REPORTER.—At the same term, in a suit by *John Williams' Admr. et als. v. John Argabrite, Treasurer of Blue Sulphur Township*, Greenbrier county, *et als.*, in this Court, by an appeal, by plaintiffs, from a decree of the circuit court of Greenbrier county, rendered on the 20th day of April, 1871, wherein substantially the same facts were alleged and the same relief sought, this Court affirmed the principles adjudicated and determined in the suit of *McClung v. Livesay, infra*.

The same principles were, also, affirmed in the case of *Ludington v. McMillan*, on appeal from the circuit court of Greenbrier county, at the same term.

## CHARLESTON.

WILLIAMS, ADMR, v. KNIGHTS.

February 27, 1874.

1. When, on motion of the defendants, the judgment entered at rules in the clerk's office, is set aside, and leave given the defendants to file a special plea in thirty days, an appellate court will presume, where no bill of exceptions has been filed, that such order was made by the consent or acquiescence of the plaintiffs.
2. The record not disclosing with certainty whether special pleas were filed, or if filed, showing that no replications were filed thereto, and no issue joined thereon, it was error to try the cause, and the judgment entered upon the verdict must be reversed.

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An appeal. by S. B. Williams, administrator *de bonis non* of Wm. McClung, deceased, from a judgment of the circuit court of Greenbrier county, rendered on the 23rd day of June, 1869, in a certain action at law, wherein the said Williams, as such administrator, as aforesaid was plaintiff, and George Knight and Alexander Knight were defendants. The facts sufficiently appear in the opinion of the Court.

The Hon. Nathaniel Harrison, judge of the said circuit court, presided at the trial below.

*Robert F. Dennis* for the appellant.

*John W. Harris* for the appellees.

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PAULL, JUDGE :

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The plaintiff brought an action of debt on the bond of the defendants for \$2,000, and the common order against the defendants was confirmed at rules in October, 1867, in the clerk's office of Greenbrier county.

At a term of the Greenbrier circuit court, held in November, 1867, the following order was made, to-wit : "This day came the parties, by their attorneys, and on motion of the defendants, the judgment entered at rules in the clerk's office is set aside, and thereupon leave is given the defendants to file a special plea in thirty days, and this cause is continued until next term." Copies of two special pleas as found in the record, which recites that they were found filed away with the papers in this cause ; and on the office judgment docket, for the term to which the suit was brought, there is found, in the handwriting of the clerk, in the column in which the minutes were made of the disposition of the several causes, at that term, this entry, "special plea ;" and on the docket for the succeeding, and each subsequent term, until the case was finally disposed of, in the column containing the last orders made, this entry, "special plea." Nothing more appears in the record, except that at the term of the court held in June, 1869, a jury was empaneled, which found a verdict for the defendants, and a judgment for the defendants was entered upon the verdict.

It is admitted, by the counsel on either side, that this judgment must be set aside owing to the irregularities appearing upon the face of the record ; but they were not equally agreed as to what judgment this Court should now proceed to enter.

It is contended by the defendants that the cause should be remanded for further proceedings, while the plaintiffs maintain that judgment should now be entered for the amount of their debt. The difficulty arises under the action of the court below, taken at the November term,

1867, setting aside the office judgment, and giving leave to the defendants to file a special plea in 30 days. The forty-fifth section of the Code of Virginia provides, (and the provision is similar in the present Code of West Virginia,) "if a defendant against whom judgment is entered in the office, shall, before it becomes final, appear and plead to issue, it shall be set aside, unless an order for enquiry of damages has been executed:" as no plea to issue was filed at the time the office judgment was set aside it is claimed that the order setting it aside was erroneous, and should now be reversed, and judgment entered for the plaintiffs. That it was competent, however, for the court, by the consent or acquiescence of the defendants, to make such order cannot be denied, and this Court, we think, may now presume that such consent was given. If the defendants desired to repel such presumption, a bill of exceptions should have been filed to the action of the court. The propriety and necessity of this course, is plainly pointed out in the case of *White v. Toncray*, 9 Leigh, 352. In that case the defendant tendered pleas of setoff which were rejected by the court. Upon a motion to have these pleas brought up on a *certiorari* before the supreme court of Virginia, that court refused the motion, holding, first, that the pleas were no part of the record and, secondly, if they were, yet as the defendant acquiesced in the rejection of them, and took no exception, he cannot now bring that matter in question before the court. Judge Tucker says "that this court must take it that they were properly rejected, as the defendant did not except. His acquiescence in the rejection must be presumed; and as it is possible there may have been good reason for the rejection, that reason must be taken to have existed, as he did not call upon the court to sign a bill of exceptions, in which its reasons would have been stated."

In this case, it is seen, that the defendant was complaining of this error of the court in rejecting his pleas;

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nts.

the court say, he should have excepted, when the reasons for the rejection might have appeared. Now, in the case under consideration, the plaintiff complains that the court set aside the office judgment, when no plea to the issue was filed, as the statute requires ; but no bill of exceptions was taken, wherein the court might have assigned reasons for so doing ; in the absence of any exceptions, for aught that this Court can now see, the order complained of may have been made with his consent, or acquiescence, and this in accordance with the language of judge Tucker, must now be presumed. This case in 9 Leigh. is followed in the case of *Bowyer v. Hewit, Ruffner & Co.* 2 Gratt. 193, and *Herrington v. Harkin's, Admrs.*, 1 Rob. (Va.) 591. With this view of the case, the office judgment, thus set aside, with the presumed acquiescence of the plaintiff, has never become a final judgment, by operation of the statute. The subsequent proceedings in the cause are irregular, even if the pleas could be regarded as properly filed. There were no replications thereto, and no issue joined or tried. The judgment rendered on the verdict is erroneous, and must be set aside and reversed, with costs to the appellant, and this Court proceeding to render such judgment as the court below ought to have rendered, doth adjudge and order that this cause be remanded to the circuit court of Greembrier county for further proceedings ; and that the defendants have leave to file good and sufficient pleas in bar, if they shall so desire, or otherwise judgment be entered for the plaintiff for the amount of his debt in the declaration mentioned, according to law, and the costs of suit.

The other Judges concurred.

JUDGMENT REVERSED AND CAUSE REMANDED.

## CHARLESTON.

HURST v. G. L. HURST.

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February 27, 1874.

S. H. (and wife), the rightful owner in fee simple of a tract of land, and the father of G. L. Hurst, conveyed, by deed dated the 9th day of December, 1863, to G. L. H. said tract of land, situate in Harrison county, West Virginia. In the early portion of the deed, the consideration of the same is stated to be one dollar. The land is described in the deed by metes and bounds and as containing one hundred and sixty-one and one-half acres "to have and to hold the above described tract of land with its appurtenances, to the said G. L. H., and his heirs, and assigns forever. And S. H., and wife covenant to and with the said G. L. H., his heirs and assigns, to warrant and defend generally the above described tract or parcel of land to the said G. L. H., his heirs &c." In the deed, immediately after the last recited clause, are the following clauses, the one immediately following the other, viz. "It is fairly understood that the above described tract or parcel of land is to be the said G. L. H's., share of his father's S. H's., estate. And it is further understood, that I, S. H., hold a life interest in the above described tract of land."—HELD:

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1. That, in ejectment the deed should be so construed as to arrive at the true intent of the grantor and grantee, and that in so doing the whole of the deed and all its parts should be considered together.
2. That, adopting the above rule, the plain legal effect of the deed, upon its face, was, and is, to convey to G. L. H., an estate in fee simple, in the land to commence upon the death of S. H., and that S. H., reserved to himself an estate for, and during, his life in the lands.

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Hurst.

3. That parol evidence as to the acts or declarations of the parties, at the time of the execution of the deed, or afterwards, are inadmissible and incompetent in such case, as evidence, to enlarge, restrain, explain or alter the intention of the grantor and grantee, as expressed in the deed, or to vary the legal effect thereof as clearly manifested by the deed itself.
4. That the deed is not so ambiguous as to admit of the introduction of such parol evidence for the purpose of determining the true intent and meaning of the parties by the language employed in the deed, or to show that it was the purpose and intent of the parties at the execution of the deed, that the deed should pass to G. L. H., an estate in fee simple, to take effect at the execution and delivery thereof, and not an estate in fee simple to take effect at the death of S. H.

An appeal, by the defendant below, from a judgment of the circuit court of Harrison county, rendered on the 12th day of October, 1870, in an action of ejectment therein pending wherein Shadrach Hurst was plaintiff and Gilbert L. Hurst was defendant.

The only question passed upon here was as to the construction of a deed from the plaintiff to the defendant, and the estate conveyed thereby, and what estate remained in the the grantor. This deed was a counterpart of that mentioned in the case of *Hurst v. M. V. B. Hurst*, reported *infra*, and the principles decided in that are fully affirmed in this case.

The Hon. Thomas W. Harrison, judge of said circuit court, presided at the trial below.

*George H. Lee* and *Caleb Boggess* for the appellant.

*C. C. Cole* for the appellee.

HAYMOND, PRESIDENT:

This is an action of ejectment brought in the county of Harrison by the plaintiff, against the defendant, in which there was a final judgment rendered by the circuit court, in favor of the plaintiff, against the defendant. The final judgment from which the appeal in this cause is taken was rendered on the 12th day of October, 1870. The cause was tried by the court in lieu of a jury, by

consent of the parties, and on the trial the defendant took an exception to the opinion, and rulings of the court, which was signed, sealed and made a part of the record. The principles and points decided by this court during the present term in the case of *Shadrach Hurst v. M. V. B. Hurst, infra*, and fully cover all the principles and points arising upon the record in this case. And for the reasons given in the opinion of the Court in that cause the judgment of the circuit court of the county of Harrison, rendered in this cause on the 12th day of October, 1870, is affirmed with costs and \$50 damages to the appellee against the appellant.

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Hurst.

The other Judges concurred.

**JUDGMENT AFFIRMED.**



## CHARLESTON.

## BRIGHTWELL, TRUSTEE, v. HOOVER.

February 27, 1874.

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A party seeking to enforce a lien for the payment of purchase money, on a contract of sale made between the first day of May, 1861, and the first day of May, 1865, said money to be paid in Confederate States Treasury notes, or Virginia Treasury notes, is entitled to the value of the same, to be ascertained under the act of the Legislature, passed on the 7th day of April, 1873, being chapter one hundred and sixteen and entitled, "an act providing for the adjustment of certain liabilities arising under contracts made between the first day of May, 1861, and the first day of May, 1865. \*

Appeal, by the complainant, from a decree of the circuit court of Greenbrier county, rendered on the 26th day of April, 1869, in a suit in chancery therein pending, wherein Henry B. Brightwell, as trustee for Sophia A. B. Hurley, wife of Reuben Hurley, was complainant and Samuel S. Hoover and said Reuben and Sophia A. B. Hurley, were respondents.

The opinion of the Court contains a sufficient statement of the facts in the case.

The Hon. Nathaniel Harrison, judge of said circuit court, presided at the hearing below.

*Samuel Price and Robert F. Dennis*, for the appellant.

*John W. Harris*, for the appellee.

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\* For the act referred to in the syllabus see *Jameson v. Myles Exor. infra*.

PAULL, JUDGE :

The bill in this case was filed by the plaintiff as trustee for Mrs. S. A. B. Hurley, to enforce a lien for the purchase money, due upon the sale of a tract of land, made to Saml. S. Hoover. The proceedings was commenced in the circuit court in November, 1866. The said Hoover, Mrs. S. A. B. Hurley and her husband, Reuben Hurley, were made parties defendant and all filed their separate answers. The bill recites the fact of sale and that the said Hoover, agreed to pay for said land the sum of \$3,000, of which \$1,500 was paid in Confederate money on the day of the sale, to-wit: the 5th day of June, 1863, and that said Hoover, executed to the plaintiff his two bonds, each bearing date on the said 5th day of June, 1863, for \$750 each, one falling due twelve months, and the other two years, after date and bearing interest therefrom. The bill further alleges, that these bonds, as they showed upon their face, were to be paid and discharged in whatever money was the currency of the country, at the time they were actually payable. The bill further states that these bonds were taken and destroyed by the Federal soldiers, and therefore cannot be produced; but that the deed made to the said Hoover, the vendee of said land, filed as part of the bill, shows the contract between the parties, and disclose, the fact that a lien was retained on said house and lot or parcel of land, for the unpaid purchase money, to-wit: \$1500, with its interest due and payable, as herein before set out; that the balance of said purchase money is unpaid, and prays for a sale of the land for its payment, and general relief. These are all of the allegations of the bill that it is now necessary to notice. This parcel of land was conveyed by Reuben Hurley as attorney in fact for the plaintiff, to the said Hoover.

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Hoover.

Reuben Hurley files his answer, under oath, admitting the contract of sale as alleged in the bill, and that the same was made under a power of attorney executed by

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the plaintiff to him, but whether the same is valid or not, is a question submitted by him to the judgment of the court. He admits the payment of \$1500 of the purchase money in Confederate money, and that the same had been safely invested for the benefit of Mrs. Hurley, (the *certui que trust*,) as so much good money; that the bonds for the deferred payments simply called for so much money, and that they were taken from him and destroyed by the Federal soldiers.

Mrs. Hurley filed her answer, under oath, alleging that the plaintiff, as her trustee under the deed of marriage settlement, dated the 17th day of August, 1852, could not sell any portion of her property, or change its character, or the character of the instrument, unless by her direction in writing, and avers that the house and lot in the bill mentioned was a portion of her estate, and that she never did authorise the plaintiff, in writing, to sell the same; while denying that the "sale was a Confederate sale," she says the property was sold for its real value in good money, and that a portion of the purchase money was received in Confederate notes, and that the same was invested as good money for her benefit; that a lien exists upon the property for the balance of the purchase money which has never been paid. She then asks that this lien be enforced by a sale of the property, or that the contract be rescinded, and the property restored to her possession.

The vendee, Hoover, also files his answer under oath, admitting the sale, and the execution and delivery of the deed, from Hurley, as attorney in fact for the plaintiff, and the execution of the two bonds for \$750, each, for the deferred payments of the purchase money, and that the same have never been paid; although alleging that before the maturity of said bonds he repeatedly endeavored to deliver sufficient of the treasury notes and currency of the Confederate States, to the plaintiff, but was prevented from so doing by the military disturbances at the time. The answer further alleges that said bonds were, by the

terms, and on the face thereof, to be paid "in currency and not otherwise," and that thereby the parties meant and agreed that said bonds should be paid in treasury notes or in currency issued by and under the authority of said so called Confederate States; the answer further denies that said bonds are lost, or not in existence or producible by the plaintiff.

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v.  
Hoover.

This bill and all the answers were filed before the present Code went into operation, and there are no replications to the answers, and no proofs in the cause.

In this state of the pleadings, it is objected in the first place, that the bill cannot be sustained, because it is not accompanied with an affidavit of the loss of the bonds, the payment of which the plaintiff is seeking to recover. A sufficient answer to this objection is found in the fact that the bill sets forth the deed itself in which the lien is retained, and where it is expressly recited to be for the payment of \$1500, the residue of the purchase money, \$750 due in twelve months from date, and \$750, the residue, due by bond in two years from above date, with interest on said bonds till paid. This deed is of equal dignity with the bonds, and the provisions of this deed the bill seeks to enforce, and if they are enforced, the decree would provide that said bonds, if in being, be delivered up and cancelled. Moreover, the husband of the *cestui que trust*, Reuben Hurley, alleges in his sworn answer that said bonds are lost. These we think remove the objection, even if there had been a demurrer to the bill.

Another objection to this proceeding is found in the answer of Mrs. S. A. B. Hurley, to-wit: that she never consented, in writing, to the making of this sale to Hoover. Admitting this to be true, we think she must now be held to have ratified the sale by her subsequent acquiescence. She admits in her answer, as does also her husband in his, that she has taken the benefit of the sale by receiving one half of the purchase money and

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Hoover.

having the same invested for her use, and by now asking that the property be sold for the payment of the balance.

Another question is submitted in the answer of Reuben Hurley, to-wit: the validity of the power of attorney from Henry B. Brightwell, trustee, to sell and convey the property in question. Upon this point, the record does not disclose sufficient information as to the facts. The bill recites that the plaintiff is the trustee of Mrs. Sophia A. B. Hurley, by virtue of a deed of marriage settlement filed with the bill, dated the 17th day of August, 1852, and as such trustee he sold the land in question to defendant Hoover; there is nothing to show that this land is embraced in said deed of marriage settlement, or was purchased with the trust funds arising from said land, or is in any way, whatever, subject to its provisions. It was conveyed to said Brightwell in the year 1859, by W. C. Woodson, a commissioner, making sale thereof under order of court; and while it was conveyed to Brightwell, as trustee, for Sophia A. B. Hurley, we cannot necessarily infer that it was so conveyed to him as trustee under the marriage settlement aforesaid. The deed of Woodson to Brightwell is a trust deed, but its provisions are not the same, or coextensive with those of the marriage settlement, but only so in part. The plaintiff is dealing with the subject of this last deed, under power, as he claims in his bill derived from the former; but the power of attorney does not itself designate under which deed he is acting in this proposed sale. No opinion is intimated on this question until more definite information is given, either by amendment of the bill or answers, if the parties shall so desire.

The answer of defendant Hoover, alleges that these bonds, for the purchase money were to be paid in Confederate Treasury notes and not otherwise; this language simply intimates the agreement of the parties, both affirm-

atively and negatively, that the bonds should be paid in Confederate money. Taking this answer in the state of the pleadings to be true, the plaintiff is entitled to enforce the collection of his claim in a court of equity, and to receive the actual value of the Confederate money at the time and place of the contract, in lawful money of the United States. *Thorington v. Smith*, 8 Wall. (Sup. Ct. U. S.) 1.

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By the second section of an act passed by the Legislature of this state on the seventh of April, 1873, it was provided that where any contract made between the first day of May, 1861, and the first day of May, 1865, was to have been performed or fulfilled in Confederate States Treasury Notes, or Virginia Treasury Notes, the same shall be liquidated and settled by reducing the nominal amount due, or payable, under such contract, in Confederate States Treasury Notes or Virginia Treasury Notes, to its true value at the time such contract was made or entered into, or at such other time as may to the court or jury, if it be a jury case, seem right in the particular case. This contract was made within the times expressed by this act, and is subject to its operation. In view of this fact, and of the foregoing authority and others, the decree entered in this cause on the 26th day of April, 1869, is reversed with costs to the appellant, and this case is remanded to the circuit court of Greenbrier county, with leave to the parties to amend their pleadings, if desired, and to ascertain the value of the Confederate money yet to be paid, under the sale to Hoover, according to the provisions of the act of the Legislature aforesaid.

The other Judges concurred.

DECREE REVERSED AND SUIT REMANDED, WITH  
LEAVE TO AMEND.

## CHARLESTON.

## CLAY v. ROBINSON, ADMINISTRATOR.

March 2, 1874.

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1. J. Marcus Alderson, who resided in the county of Greenbrier, in the State of West Virginia, died, in said county, in the year 1863, prior to the 26th day of October, 1863, intestate. The State of West Virginia, was formed out of the State of Virginia, after the commencement of the late civil war, and the government of West Virginia was organized and went into operation at the city of Wheeling, under a constitution, on the 20th day of June, 1863. At the commencement of said war, the government of Virginia, at Richmond, the capital of the State of Virginia, adhered to, and aided the late Confederate Government, (so called) in said war with the United States. About the commencement of said war a part of the people of the State of Virginia, organized a government for the State of Virginia, at the city of Wheeling, called the Restored Government of Virginia, which Government was recognized by the government of the United States, as the lawful Government of the State of Virginia, throughout the war. In the State of Virginia, before, and during, the war, there was held in each county, a county court, with authority to appoint administrators, and to revoke the appointment of such fiduciaries in certain cases. County courts were unauthorized, by the constitution and laws of West Virginia, and by the laws of West Virginia the Recorder, alone, of each county, was authorized to appoint administrators. The restored Government of Virginia, and the government of West Virginia, was never organized in Greenbrier county, during said war, but said county was held by the military forces of the Confederate Government, and of the government of Virginia, at Richmond, during all that time. And during the war the said county court held its sessions in said county, and appointed administrators, &c. On the 26th day of October, 1863, after the organization of the government of West Virginia, at Wheeling, and contrary to the laws thereof, the said county court of Greenbrier county appointed Malinda S. Alderson, administratrix of said J. Marcus Alderson, deceased. After-

wards, and after the end of the war, and on the 16th of December, 1868, *William Robinson* was appointed administrator of the estate of said Alderson, deceased, by the Recorder of said county. Afterwards C., brought an action of debt in the circuit court of said county, against said Robinson (as administrator) to recover a debt claimed to be due from his intestate. Robinson filed a plea in said action of non-administrator, to which a general replication was filed and issue joined.—HELD:

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That Robinson was, after his appointment, the proper administrator of said decedent Alderson, and that he was properly sued as such, and that although the acts of said Malinda S. Alderson, as administratrix of said Alderson, prior to the laws of West Virginia being extended over and enforced in the said county, and the appointment of said Robinson as administrator, will be recognized as valid generally—still whatever authority she may have had as administratrix, as aforesaid, ceased on the appointment of said Robinson, as administrator, if not before, although she had no notice of such appointment.

2. C., brought an action of debt against R., administrator of A., to recover the amount of a bond made by A., and another, to C., in the lifetime of A. One of the pleas in the cause was payment, on which issue was joined. At the trial, C., to maintain the issue on his part, gave in evidence to the jury the said bond dated 9th of August, 1859. R., then, to maintain the issue on his part, read in evidence, a paper writing purporting to be a receipt from C., plaintiff, to A., deceased, in full of all demands, dated October 15th, 1860; C., denying the genuineness of said receipt, and of the signature thereto, was then permitted, by the court, without objection, to prove to the jury, by evidence, that the body of said bond was in the hand writing of C.—HELD:

That, after the court had so allowed the proof, that the body of said bond was in the hand writing of the plaintiff to go to the jury, without objection, as aforesaid, it was error in the court to permit a witness, who was an expert, and who was not acquainted with the hand writing of C., to give as evidence his opinion, (founded solely upon the comparison of the hand writing of the body of said bond, and the signature to said receipt,) that the body of the bond and the signature to the receipt was not written by the same person, as the fact that the body of the bond was in the hand writing of C., plaintiff, does not appear to have been admitted by the defendant, or that the defendant was in any way estopped from denying the fact; and it not appearing that the said bond, or receipt, belonged to the witness, who was himself previously acquainted with the parties' hand writing, and exhibited them, or either of them, in confirmation or explanation, of his own testimony. (Perhaps other cases may arise where such evidence would be admissible, and cases also which should be held to be



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exceptions to the rule which is not now determined.) Here the writings were not of ancient, but of comparatively recent date, and witnesses were examined who were acquainted with plaintiff's hand writing.

3. The plaintiff having examined witnesses to impeach the character of ——— Miller, for truth and veracity, the defendant, to sustain the character of his witness, Miller, introduced before the jury, a witness, and asked him if he knew the character of said Miller, for truth and veracity, among his neighbors, and he replied, "I cannot say I do." Witness then said he resided four or five miles from said Miller, and had known him for four or five years, and that he had never heard a word against him as a man of truth and veracity. And thereupon, the defendant asked the witness "whether he would, or would not, believe said Miller upon oath."—HELD:

That the court properly refused to permit the witness to answer the question.

4. Where issues are joined upon pleas of payment and of non-administrator the plaintiff, is entitled to open and conclude the argument of the cause before the jury.
5. Where an instruction is given to the jury by the court, at the instance, of the plaintiff which does not correctly propound the law, but it is manifest from the record, that the defendant could not, thereby, have been prejudiced or injured the appellate court will not reverse the judgment of the court below on account of such instruction.

A *supersedeas* to a judgment of the circuit court of Greenbrier county, by Wallace Robinson, who, as Sheriff of said Greenbrier county, and as such, administrator of J. Marcus Alderson, deceased, was the defendant below, in an action of debt wherein Thomas G. Clay was plaintiff. The judgment was rendered on the 24th of June, 1873. The material facts sufficiently appear in the opinion of the Court.

The Hon. Homer A. Holt, judge of said circuit court, presided at the trial below.

*Samuel Price* and *James W. Davis*, for the appellant.

*John W. Harris* and *Mathews & Mathews*, for the appellee.

HAYMOND, PRESIDENT:

This is an action of debt brought in the circuit court of the county of Greenbrier, by the plaintiff against the

defendant as sheriff of that county, and as such administrator of J. Marcus Alderson, deceased. The action was commenced on the 29th day of May, 1869. At the circuit court held on the 23rd day of October, 1869, the office judgment had in the cause was set aside on the defendant appearing in court, by his attorney, and filing a plea of payment, to which a general replication was had. Afterwards on the 5th day of December, 1871, the parties appeared in court by their attorneys, and a jury was duly sworn, and empanelled to try the issue joined, and the jury found a verdict in favor of the plaintiff, for \$652.50, debt, with interest thereon, from the 7th day of December, 1871, till paid. The defendant moved the court to set aside the verdict of the jury, and grant him a new trial in the cause. The motion was sustained by the court, and a new trial granted. The reasons for which the court granted a new trial do not appear in the record. Afterwards on the 6th day of June, 1873, the defendant, by leave of the court, filed an additional plea, in which he denied that he was then, or ever had been, administrator of the rights and credits of the decedent, Alderson. It appears, that afterwards, during the same term, the plaintiff objected to the filing of the plea, but the objection was overruled; and thereupon the plaintiff filed a general replication to the plea, and issue was joined. At the same term, a jury was duly empanelled to try the issues joined, and found in favor of the plaintiff a verdict for \$686.25. Whereupon the defendant moved the court to set aside the verdict, and grant a new trial. Afterwards, on the 24th day of June, 1873, the court overruled the motion for a new trial, and rendered judgment in favor of the plaintiff, upon the verdict of the jury. The defendant filed exceptions to several rulings of the court during the trial, and, also, to the opinion of the court refusing a new trial. By bill of exception No. 1 it appears, that during the trial the plaintiff in support of one of the issues joined, read in evidence to the jury an official copy of an order made by the Re-

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corder of Greenbrier county, on the 16th day of December, 1868, in these words, viz: "J. Marcus Alderson, of this county, having died intestate more than three months ago, and no person having applied for administration of his goods and chattels, on the motion of Thomas G. Clay, it is ordered that *William Robinson*, sheriff of this county, take the estate into his possession, and administer the same according to law." The defendant read in evidence to the jury a paper writing purporting to be a copy of an order made by the county court of Greenbrier county, which is in these words viz: "Greenbrier county court, October 26, 1863. On motion of Malinda S. Alderson, who made oath, and together with William M. Patton, and Nathan Perry, her securities, entered into, and acknowledged a bond, in the penalty of \$4,000, conditioned according to law, certificate is granted the said Malinda S. Alderson for obtaining letters of administration upon the estate of John Marcus Alderson, deceased, in due form. A copy teste: Mark L. Spotts, clerk." The plaintiff also proved to the jury that said Malinda Alderson, had, on the 16th day of March, 1870, intermarried with one Wm. G. Miller, and also proved that he had defended suits brought against him as administrator of the estate of said Alderson, deceased, and had consulted a lawyer about the business, and had otherwise acted as such administrator, in pursuance of the order committing the estate to him; and then introduced a witness, and proved by him, that Henry Robinson, was the deputy of Wallace Robinson, and had acted as deputy sheriff of said Wallace, and then asked the witness to tell what Henry Robinson had done in administering the estate of said Alderson, and the defendant objected to the question, and his objection was overruled, and he excepted; and the witness answered, that Henry Robinson had caused an execution to issue in a case in which Wallace Robinson had been sued, as administrator, and that he, Henry Robinson, had paid witness, who was deputy clerk, a fee bill; and the defen-

dant objected to the answer, and asked that it might be excluded from the jury, and the court refused to exclude it, and the defendant excepted. After the evidence was closed, the plaintiff asked the court to give to the jury this instruction, to-wit: "That although Malinda S. Alderson, may have been appointed administratrix of the personal estate of John Marcus Alderson, deceased, on the 26th day of October, 1863, by the county court of Greenbrier county, yet, if they believe from the evidence that she intermarried with William G. Miller, on the 17th of March, 1870, and that the estate of said Alderson, was, by the Recorder of said county, on the 16th December, 1868, committed to defendant Wallace Robinson, as sheriff of said county, to be administered, and that in pursuance of said order, he acted as such administrator, then they must find for the plaintiff on the issue joined on the plea of *non administrator*. The defendant by his attorney, objected to the court giving this instruction, but the court overruled the objection, and gave the instruction to the jury.

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It appears by bill of exceptions No. 2, that the defendant, by his attorney, after the evidence was closed, asked the court to give to the jury the following instructions, viz: 1st. That the order of the county court of Greenbrier county made on the 26th day of October, 1863, and the same read to them, cast the administration of the estate of John Marcus Alderson on Malinda S. Alderson, and she thereby became the administratrix of said estate, and so continued unless she was removed therefrom; and that she was not removed from her office of administratrix, aforesaid, by reason of the order of the Recorder of Greenbrier county, made on the 16th day of December, 1868, and the same read to the jury.

2d. That if Malinda S. Alderson, was appointed administratrix, of the estate of John Marcus Alderson, she was not removed by the effect of the order of the Re-

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corder of Greenbrier county, made on the 16th day of December, 1868, and read in evidence to the jury.

3rd. If the jury believe from the evidence, that on the 26th of October, 1863, Malinda S. Alderson was appointed administratrix of the estate of John Marcus Alderson, and she had not been legally removed from her said office, on the day this suit was instituted, then she was the rightful administratrix, and Wallace Robinson was not the administrator of John Marcus Alderson, and the jury must find for the defendant, on the plea of never administrator:

All of which three instructions so asked by the defendant, the court refused to give.

For convenience I will first consider if the circuit court erred in refusing to give the instructions asked by the defendant. To determine this question properly it is necessary to recur to the time this State became a separate State of the Union, the state and condition of things within her limits, and especially in October, 1863, when Malinda Alderson is claimed to have been appointed administratrix of Alderson, deceased, by the county court of Greenbrier. It is also necessary to consider parts of the Constitution and laws of this State in force before, and at the time, of such appointment of Mrs. Alderson. The Constitution of this State under which she became a separate State, took effect on the 20th of June, 1863, and on that day the government of the State became organized, and operative. The fifth section of article seven of the State Constitution, then in force, provided, that the voters of every county should elect a Recorder, and that he should hold his office for two years. The sixth section of the same article provides, among other things that the Recorder shall have authority to appoint and qualify personal representatives under such regulations as may be prescribed by law. There was, at the time of the formation of this State, and for many years before, county courts in each county of Virginia, which had authority to appoint personal representatives, and

these county courts continued to exist in Virginia until after the year 1863. On the 3rd day of September, 1863, the Legislature of this State passed a law providing that Recorders of every county shall have the same power to hear proof of, and admit wills and authenticated copies thereof to probate, to appoint, take bonds from, and qualify or remove personal representatives, that the county courts of the respective counties had on the 19th day of June, 1863. See Acts of 1863, chapter thirty-six page thirty-five. The Constitution and laws of this State did not recognize, or provide, for any such tribunal as the "county court," and under the Constitution and statute laws of the State after the 20th of June, 1863, and for several years subsequent, county courts had no existence. But this State was formed during the late great Civil War, from the territory of Virginia. Prior to and at the time of the commencement of the war the seat of government of Virginia was at the city of Richmond. About the time of the commencement of the war the authorities of the government of Virginia, at Richmond, adhered to and united with the Confederate States in the war with the United States, and so did a large portion of the citizens of Virginia, and in fact the larger part of the counties thereof. Soon after the government of Virginia, at Richmond, became identified with the Confederate States, in the war, another government of Virginia, known and called as the Restored Government of Virginia, was organized and established at the city of Wheeling, where it existed until the formation of this State. The Restored Government of Virginia was recognized by the government of the United States from its organization, as the lawful government of Virginia. The government of this State recognized as the lawful government of the State by the government of the United States, with its seat of government located at Wheeling as the temporary capital, adhered to and aided the government of the United States in the war. "It had its troops in the field aiding the

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Federal forces to maintain, not only the Federal, but its own authority over its territory; but, nevertheless, the Confederate troops held the county of Greenbrier by paramount force, and thus maintained over it the State organization and authority, which adhered to the Confederate cause and held its capital at Richmond." However much the citizens of Greenbrier county might have desired to have organized under the Constitution and laws of this State, they could not do so, and have the Constitution and laws enforced among and over them. They could not do so, because of the *paramount force* of the State government at Richmond; and although that government was declared to be an unlawful government, it was nevertheless, an actual government of paramount force at that time. Or, in other words, it was a *de facto* government. See *Texas v. White*, 7 Wall. (Sup. Ct. U. S.) opinion of judge Chase, page 733; *Thorington v. Smith*, 8 Wall., (Sup. Ct. U. S.) 1; *Griffin v. Cunningham*, 20 Gratt., 31; *Sherfy v. Argenbright*, 1 Heiskel, (Tenn.) 128; *Harrison, Exor., v. Farmers' Bank of Virginia*, 6 W. Va. 1; *Henning v. Fisher*, *Id.* 238.

The constitution and laws of this State were not, and could not be, for the reasons above stated, extended over and enforced in the county of Greenbrier until about the time or after the surrender of General Lee's army at Appomattox Court House, Virginia. Hence it is there was a county court held in the county of Greenbrier in October in 1863, and it was that court that appointed Mrs. Alderson administratrix of Alderson, deceased. As I stated, the county court in Greenbrier was held and maintained contrary to the Constitution and laws of this State. An administrator is the mere creature of law, and is not a public officer. As Mrs. Alderson was appointed administratrix, as above stated, only, she cannot be considered or held to have been appointed administratrix in pursuance of the laws of this State. But as such administratrix, thus appointed, her acts from public policy and necessity, on the authority of the case

of *Texas v. White*, 7 Wall. (Sup. Ct. U. S.) 700; *Thorington v. Smith*, 8 Wall., (Sup. Ct. U. S.) 1; and *Henning v. Fisher*, 6 W. Va., 238, above cited, must be recognized, as valid, generally, though prior to the Constitution and laws of this State being extended over the county of Greenbrier and therein enforced; and the appointment of an administrator of the estate was regularly made by the Recorder in accordance with the laws of this State. In the case of *Texas v. White*, 7 Wall., (Sup. Ct. U. S.) 700 Judge Chase says: "Acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts which would be valid, if emanating from a from a lawful government must be regarded, in general, as valid, when proceeding from an actual, though unlawful, government." The act of the Legislature of this State, approved March 31st, 1872, page 168, among other things, only makes valid any act or deed done and performed in certain of the counties of this State by any executor, administrator, or other fiduciary who qualified in Virginia, &c. It seems to me that when the law of this State became extended over the county of Greenbrier, and it was enforced by the Recorder, by the appointment of an administrator, as in this case, every possible authority of Mrs. Alderson as administratrix ceased by operation of law, if it did not terminate before. The act of the Legislature makes valid the acts of certain officers between the 17th day of April, 1861, and the time of the organization of this State in the counties &c." It is known that when the war ended, and the various counties of this State were organized under the Constitution and laws thereof, as in the county of Greenbrier, that the appointments of personal representatives made during the war, after the formation of his State, by the county courts were held and treated as null by the authorities of this

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State ; and in many instances, if not in all, where there was any estate, administrators were appointed by the Recorders, just as though there had been no previous administration. And to hold now that the last appointments were null and void, because there was, previously, administrators, of the description named, might be productive of great loss and injustice, and I would not feel it to be right to so hold, under the circumstances, unless the law of the case was so clear in that direction as not to admit of reasonable doubt. The questions arising and growing out of the complications of the war in this State are exceedingly difficult, and must be decided, in many instances, in the absence of precedent, and we are compelled, in a great degree, to look to the attainment of justice. The cases cited by counsel for appellant in 8 Cranch, Virginia and other States, are not applicable here. These were cases where executors and administrators had been regularly appointed in times of profound peace, and in accordance with the laws of the State, They were not encumbered with the embarrassments of this case. Under the circumstances, while I hold the acts of Mrs. Alderson, as administratrix as aforesaid, if she ever did any after she qualified as such, which does not appear in this case, with some qualifications, to be valid: still I hold that the appointment of the defendant was proper and valid, and that by virtue of the appointment, he became the sole administrator of the estate of Alderson, deceased, then unadministered by the administratrix, and that he, and he alone, was the only person against whom this suit could have been brought at the time of its institution. Entertaining these views, the circuit court did right in refusing to give the three instructions asked by the defendant.

This brings me to the consideration of the instruction asked by the plaintiff and given by the court. While I do not think that this instruction propounds the law correctly, when taken altogether, still I am clearly of the opinion, under the views above expressed, that the

defendant could not have been, thereby, prejudiced in the least, as the court should have instructed the jury that if they believed from the evidence that the estate of Alderson, deceased, was, by the Recorder of Greenbrier county, committed on the 16th day of December, 1868, to the defendant, Wallace Robinson, as sheriff of said county, to be administered, then they should find for the plaintiff, on the issue joined, on the plea of non-administrator. Robinson, under the appointment of the Recorder, and by force thereof, was the administrator, under the circumstances. whether Mrs. Alderson married before or after his appointment. With this view of the question the judgment should not be reversed simply because the instruction was not correctly propounded as it is clear that the appellant could not have been prejudiced thereby.

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It further appears by bill of exceptions No. 1, that the plaintiff, to sustain the issue on his part, gave in evidence to the jury, the bond in the declaration mentioned, which is for \$375, dated 9th day of August, 1859, payable at its date, with interest from date, and signed and sealed by J. Marcus Alderson and T. B. Patton, and afterwards the defendant, to sustain the issue on his part, gave in evidence to the jury a receipt in these words, viz: "Received of J. Marcus Alderson, \$496, payment in full of all demands," dated October, 15th, 1860, and signed with the name of Thomas G. Clay, and attested, by Lewis Miller. And thereupon, the plaintiff who denied the genuineness of said receipt, and the signature thereto, purporting to be his, after having proved that the body of said bond was in the hand writing of plaintiff, (the evidence as to the genuineness of said receipt being conflicting,) called and had sworn, as a witness, James Montgomery, and asked him "what his occupation had been," and the question was objected to by defendant, and the objection overruled and the defendant excepted; and the witness answered that "he had been for ten years teller in the Bank of Lewisburg, and

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had been in the habit, as part of his business, of comparing hand writings and signatures," and the defendant objected to the answer, and his objection was overruled, and he excepted. The plaintiff then asked the witness if his business had not given him an opportunity to compare hand writings, and if he had not thereby become more competent to compare hand writings, and thereby detect the false from the true, than ordinary persons, and the defendant objected to the question—the objection not going to the form of the question—but his objection was again overruled and defendant excepted. The witness answered "that his business had, in his opinion, made him more competent than ordinary persons to detect, by comparison of hand writing, a genuine from a simulated writing," and the defendant objected to the answer, but his objection was overruled, and defendant excepted. And the plaintiff then gave the witness the bond sued on, and the receipt attested by Miller and asked him whether or not, the body of the bond and the signature to the receipt, were written by the same person, and the question was objected to by the defendant, and his objection was overruled, and defendant excepted. The witness answered that "in his opinion the body of the said bond and the signature to said receipt attested by Lewis Miller, were not written by the same person." The defendant objected to the answer, and asked the court to exclude it from the jury, but the court overruled the objection and permitted the answer to remain before the jury, and the defendant excepted. It is expressly stated in the bill of exceptions that none of the foregoing questions were objected to on account of form. It does not appear that the defendant objected to the plaintiff proving before the jury that the body of said bond was of the hand writing of the plaintiff.

The only question presented here, is whether the court erred in permitting the evidence of James Montgomery, to go before the jury. Montgomery in his evidence, does not pretend to be acquainted with

the hand writing of plaintiff. If Montgomery's, evidence is admissible at all, it must be, because he is an expert in distinguishing between hand writings, and that it is competent for him, as an expert, without having any acquaintance with the hand writing of the party, to give his opinion to the jury as evidence, as to which is the genuine and which the false, or assimilated, or rather in this case whether an expert who has no acquaintance with the hand writing of the party, shall be allowed to give his opinion, founded solely, on a comparison of hands, or the juxtaposition of two writings for the purpose of ascertaining whether both were written by the same individual. The general rule seems to be that to render a witness competent to give his belief, as to hand writing, he must have some personal knowledge of the hand writing of the person whose writing is in question; which may be acquiring in different ways. 1 Green., Ev. section 577. To this rule says Greenleaf 1 vol. on Ev. section, 578, there seems to be two exceptions to-wit: (1.) Where the writings are of such antiquity that living witnesses cannot be had, and yet are not so old as to prove themselves: (2.) Where other writings, admitted to be genuine, are already in the case. Here the comparison may be made by the jury, with or without, the aid of experts. The reason assigned for this is, that as the jury are entitled to look at such writings for one purpose, it is better to permit them for all purposes, than to embarrass them with impracticable distinctions, to the peril of the cause. In the case under consideration, the body of the bond does not appear to have been admitted to be in the hand writing of the plaintiff, nor was the signature to the receipt; and it does not appear in any way, that the defendant was estopped from denying the hand writing of the body of the bond being that of the plaintiff. It does appear that the said bond was produced by the plaintiff. The bond, the court says, in the bill of exceptions, was proved to be in the

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hand writing of the plaintiff, and the hand writing of the receipt or rather the signature thereto, was in dispute; and as bill of exceptions No. 2, certifying a part of the facts proven, and evidence, says, the evidence as to the genuineness of the receipt was conflicting. In the case of *Rowl's Administratrix v. Kile's Administrator*, 1 Leigh., 216, "upon the trial of the issue, on a plea of *non est factum*, whether the parties signature to the instrument in question, be genuine or no; *held* inadmissible to lay other proved specimens of the party's hand writing before the jury, that it may judge by comparison thereof with the writing in question, whether this be genuine. Such comparison of hand writing is not proper evidence." According to this decision, it was not competent for the plaintiff to prove before the jury that the body of the bond in evidence was in his hand writing for the sole purpose of instituting, by the jury, a comparison of the hand writing of the receipt, and body of the bond, to determine, the genuineness or falsity of the signature to the receipt and that the receipt or signature thereto were not of the hand writing of the plaintiff. Befere the introduction, and admission of the receipt it was wholly immaterial, whether the body of the bond was in the hand writing of the plaintiff or not, and proof of the hand writing of the bond after the receipt was given in evidence for the sole purpose of enabling the jury to institute a comparison of hand writing under the circumstances was not permissible according to the case in 1 Leigh., above cited. The principle involved is no other than that repudiated in the case in 1st Leigh.; Greenleaf, in his 1 vol. on Ev., sec. 581 says: "But with respect to the admission of papers irrelevant to the record, for the sole purpose of creating a standard of comparison of hand writing the American decisions are far from being uniform. If it were possible to extract from the conflicting judgments a rule, which would find support from the majority of them, perhaps it would be found not to extend beyond this; that such papers can

be offered in evidence to the jury, only where no collateral issue can be raised concerning them; which is only where the papers are either conceded to be genuine, or are such as the other party is estopped to deny; or are belonging to the witness, who was himself previously acquainted with the party's hand writing, and who exhibits them in confirmation, and explanation of his own testimony. See notes two and three to said section for cases cited. Admitting that the witness Montgomery had sufficient knowledge and experience to constitute him an expert, still I think upon principle and the weight of authority in England and America that under the circumstances as shown, the court erred in allowing the witness to state, as evidence to the jury, his opinion, that the body of the bond sued on and the signature to the receipt, attested by Lewis Miller, were not written by the same person. If the bond and receipt were of mere ancient date it might be different. *Hawkins v. Grimes*, 13 B., Mon. (Ky.) 257; *The People v. Spooner*, 1 Denio. (N. Y.) 343; *Vanwick v. McIntosh*, 4 Kernan (N. Y.) 439; *Rout's, Administratrix v. Kile's Administrator*, 1 Leigh., 216; 1 Green. on Ev., 581.

It might also be different if the body of the bond was admitted to be in the hand writing of the plaintiff or the defendant was estopped to deny the fact, or the bond belonged to the witness who was himself previously acquainted with the party's hand-writing; and perhaps other cases may arise where such evidence would be admissible and cases also which should be held to be exceptions to the rule, but as to this it is now unnecessary to express an opinion.

The plaintiff having introduced witnesses to impeach the character of Lewis Miller, for truth and veracity, who it seems was a witness introduced and examined by the defendant in support of the issue, on his part, the defendant introduced a witness, and asked him if he knew the character of Lewis Miller, for truth and veracity, among his neighbors, and he replied: "I cannot say I

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do." The defendant then asked him how far he lived from Lewis Miller, and he answered, four or five miles. Defendant then asked him how long he had known Lewis Miller, and he answered, about four or five years. The defendant then asked him if he had ever heard a word said against him as a man of truth and veracity, and he replied, he had not; and, thereupon, the defendant asked him to tell whether, or not, he would believe Lewis Miller upon oath, but the plaintiff objected to the question, and his objection was sustained, and the witness was not permitted to answer the last question, and the defendant excepted. The question here presented is, simply, whether the court erred in refusing the witness to answer the question last above named. In this State, and in Virginia, the courts have generally adhered, in an attempt to impeach a witness for truth and veracity, to the rule adopted, and affirmed in *Uhl's Case*, 6 Grattan, 706. The rule in that case seems to be very much like the rule adopted by the courts of England.

In 1 vol. of Green on Ev., sec. 461, it is said, "after a witness has been examined, in chief, his *credit may be impeached* in various modes besides that of exhibiting the improbabilities of a story, by a cross-examination. (1.) By *disproving* the facts stated by him by the testimony of other witnesses. (2.) By general evidence affecting his credit for veracity. But in *impeaching* the credit of a witness, the examination must be confined to his general reputation, and not be permitted as to particular facts,

\* \* The regular mode of examining into the general reputation is to inquire of the witness whether he knows the general reputation of the person in question, among his neighbors, and what that reputation is. In the English courts the course is further to inquire, whether from such knowledge the witness would believe that person, upon his oath. In the American courts the same course has been pursued, but its propriety has, of late, been questioned, and, perhaps, the weight of authority is now against permitting the witness to testify. In an-

swer to such evidence, the other party may cross-examine those witnesses, as to their means of knowledge, and the grounds of their opinion; or may attack their general character, and, by fresh evidence, support the character of his own witness. \* \* It is not enough that the impeaching witness professes merely to state what he has heard "others" say; for those others may be but few. He must be able to state what is generally said of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character. And, ordinarily, the witness ought himself to come from the neighborhood of the person, whose character is in question."

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As before stated the rule in *Uhl's Case* permits the impeaching witness to say, on his oath, that from his knowledge of the general character of the witness sought to be impeached, he would, or would not, believe him on oath; but he is not permitted to state whether he would, or would not, believe him on oath until he has first stated on his oath that he knows his general character among his neighbors and acquaintances, and also his general character for truth among his neighbors and acquaintances, whether upon oath or otherwise. As before stated the rule in *Uhl's Case* has been generally sanctioned and adhered to, substantially, by the courts of Virginia, and of this State, in an attempt to impeach the character of a witness. But it is maintained that this rule should be relaxed in cases where the general character of the witness for truth and veracity, has been assaulted, and an attempt is made to sustain the character of the witness thus assaulted, and that the sustaining witness notwithstanding he is unable to state that he knows the general character of the assaulted witness, and is also unable to state that he knows his general character for truth and veracity among his neighbors and acquaintances, but states that he has known the assaulted witness for four or five years, and that he resided four or five miles from him, and that he had never heard a word against him as



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a man of truth and veracity, should be permitted to testify to the jury whether he would or would not believe the assaulted witness upon oath. To sustain this proposition the appellants' counsel has cited the case of *Lemons v. The State* 4 W. Va., 755. The question presented in that case is very different from that presented here in the *Lemons Case*. "It appears that when the witness McAllister was introduced, the usual question whether he was acquainted with the general reputation of the witness McDowell, for truth and veracity among her neighbors was propounded to him and having answered in the affirmative the question was then propounded to him, by the court, whether he had ever heard any person speak of her character for truth and veracity, and the witness thereupon replied (in substance) that he had known her for fifteen years and had never heard her character, in this respect questioned, and had never heard any person say anything about her character for truth and veracity; and thereupon the court excluded the witness, as incompetent, to testify as to the character of the witness, McDowell, for truth and veracity. The witness McAllister had been introduced to sustain the character of the witness McDowell, whose reputation for truth and veracity, had been impeached. The question whether the witness McAllister should be permitted to state whether he would or would not believe the witness under oath, was not presented, and was not passed upon. But the witness did state, on his oath, that he did know the general character of the witness for truth and veracity among his neighbors. In this case Judge Berkshire said "it appears to me that a person who should prove by those, in his community by whom he is well known, that his reputation for truth and veracity has never, so far as he knows, been called in question or talked about among his neighbors, might well claim, in the absence of evidence to the contrary, to have shown at least a *prima facie* case of good character in this respect, and to have produced the most direct and satisfactory evidence, to rebut

evidence of bad character, in case any may have been produced against him." In the case of *Buckie v. The State of Ohio*, 20 Ohio, justice Caldwell, says, "as to the charge of general bad character, if untrue, every person in the neighborhood can give specific evidence rebutting it. If not able to state affirmatively the person is well spoken of in the neighborhood, the witness can state that he knows of no such general bad reputation, which goes directly to rebut the allegation of its existence." No case has been cited or brought to our attention, showing, or tending to show, that the circuit court erred in refusing to permit the witness to state whether he would, or would not, believe Miller upon oath, under the circumstances disclosed by the record; and I think that the circuit court did not err in this respect.

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The pleas in this case were a general plea of payment, and that the defendant was never administrator, &c.; to each of which there was a general replication and issue. On this state of the pleadings the plaintiff was entitled to open and conclude the argument of the case.

I have considered all the questions presented by bill of exceptions number one; and bill of exceptions number two is taken to the judgment of the court in overruling the defendant's motion for a new trial. The bill does not profess to state all the evidence or facts proven before the jury. And I have already considered several questions presented, and, indeed, all that I deem of any importance.

For the reasons above stated, the judgment rendered in this cause, by the circuit court of Greenbrier county, on the 24th day of June, 1873, must be reversed and annulled, the verdict of the jury set aside and a new trial awarded, with costs in this Court to appellant, and the cause must be remanded to said circuit court for further proceedings therein to be had according to law.

Paull and Moore, Judges, concurred. Hoffman, Judge, did not sit at the hearing of this case, by reason of sickness.

JUDGMENT REVERSED, VERDICT SET ASIDE, NEW TRIAL AWARDED AND CAUSE REMANDED.

## CHARLESTON.

## STRAUSS v. RAILROAD COMPANY.

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A contract between M and a railroad company, provides that if M shall fail to prosecute the work with such force as the engineer shall deem adequate to its completion, within the time specified, the engineer, in charge, may proceed to employ such number of laborers, &c., as may be necessary to insure the completion of the work within the time limited; pay all persons so employed, and charge the amount to M: or the company may, for any neglect or omission on the part of M, in complying with the contract, declare the same abandoned and render it void, and the percentage, or as much thereof, remaining in the hands of the company, as may be necessary for its complete indemnity, be forever retained.—HELD:

That on the voluntary abandonment of the work by M, and while the contract is still subsisting between the parties, there is nothing in the hands of the company due to the contractor which may be attached.

The contract provides that an estimate shall be made on the first of every month, of the value of the work, and ninety per cent. thereof paid to the contractor, and that upon the completion of the entire work, a final estimate shall be made, and the balance then appearing due, shall be paid to the contractor: M abandons the work in the middle of a month.—HELD:

That M has earned nothing for the previous part of the month, and that the reserved estimates never became a debt which could be attached.

Appeal, by the Chesapeake and Ohio Railroad Company, from a judgment of the circuit court of Kanawha county, rendered on the 16th day of June, 1873, in a proceeding in garnishment, therein pending, in favor of

Samuel Strauss against the said Railroad Company, as debtors of M. Healey & Co., who were judgment debtors of said Strauss. The material facts appear in the opinion of the Court.

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The Hon. Joseph Smith, judge of said circuit court, presided at the time, below.

*William A. Quarrier* and *William H. Hogeman*, for the appellant.

*Mollohan & Nash*, for the appellee.

PAULL, JUDGE :

The plaintiff having brought suit against M. Healey & Co., sued out, on the first day of December, 1871, from the clerk's office of the circuit court of Fayette county, an order of attachment, requiring the sheriff of Kanawha county to attach and take into his possession the estate of the defendants, sufficient to pay the sum of \$300, and the costs of suit. On this order, the plaintiff designated, by his endorsements, the Chesapeake and Ohio Railroad Company as a party indebted to, or having in its possession, the effects of the defendants, M. Healey & Co. And a summons was directed to said Company to appear before the judge of the circuit court of Fayette county, and disclose, on oath, in what sum it is indebted to said defendants, and what effects of said defendants it has in its hands.

This order of attachment and summons were served on said Railroad Company, by delivering a copy thereof to H. Chester Parsons, one of the directors of said Company, on the 8th day of December, 1871. In May, 1872, the Railroad Company tendered its answer, alleging that the said Company was not, at the time of the service of said order of attachment, nor has said Company at any time since said service, been indebted to the defendant in this cause, or had in its possession or control, any goods, chattels, money, securities or other effects, belonging to the said defendants. To the filing of this answer, the

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plaintiff excepted, and the exception was sustained by the court. At a term of said court, however, held in May, 1872, the exception was withdrawn, and the answer filed. And thereupon, the plaintiff suggested, upon the record, that the said garnishee had not fully disclosed the debts due by it, to the defendants, or the effects of said defendants in its hands.

By consent of parties, this suit was transferred to the circuit court of Kanawha county. At a term of said court, held in June, 1873, the plaintiff and the garnishee came, by their attorneys, and neither party desiring a jury, by consent, the court in lieu of a jury, proceeded to try the issue joined upon the answer of said garnishee, and the suggestion made upon the record, by the plaintiff, and having heard all the evidence, the court found the issue for the plaintiff, and that at the time the attachment was served upon the garnishee, it had in its possession, funds of the defendants, M. Healey & Co., liable to said attachment, sufficient to discharge the plaintiff's judgment; and thereupon, the said garnishee moved the court to set aside the said finding, and award a new trial, upon the ground that the same was contrary to the law and evidence; which motion was overruled by the court. And thereupon, the court proceeded to render judgment against the said garnishee for the sum of \$282.01, with interest and costs, and \$15, statute fee allowed by law. And thereupon the garnishee, the Chesapeake and Ohio Railroad Company, tendered a bill of exceptions, which is signed and made a part of the record, and setting forth all the evidence in the case. From this judgment an appeal is taken to this Court.

Is there error in this judgment, as seen from an examination of the evidence, and under the law, is the question now submitted for determination here. The fifth section of chapter one hundred and six of the Code prescribes how an attachment may be levied, and that any person designated, "as being indebted to, or having in his possession, the effects of the defendant," may be summoned

to appear and answer. The ninth section provides that the plaintiff shall have a lien from the time of levying such attachment, or serving a copy thereof upon the personal property, choses in action and other securities of the defendant against whom the claim is, in the hands of, or due from the garnishee, &c. The sixteenth section provides that when it is suggested, that full disclosure has not been made by the garnishee, the court shall cause a jury to be empanelled, without any formal pleadings, "to inquire as to such debts and effects."

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Under this last section, the court, (a jury being waived,) proceeded to make the inquiry therein directed, to-wit: as to such "debts and effects."

Looking now at the evidence on the part of the plaintiff, we find that the plaintiff introduces the depositions of two witnesses, Nicholas Mason and Jonn C. Ruby, who prove that certain claims or accounts due to them from M. Healey & Co., the defendants, were paid to them by Cabell Breckenridge, on the 20th day of January, 1871, which payments were thus made about twelve days after the service of the attachment on the garnishee. While it appears that said Breckenridge was a resident engineer on the work of the garnishee, it is not shown that he made these payments as the disbursing agent of the Company, or under its authority, or by its direction; and especially, it does not appear that he made these payments out of any moneys or funds recognized or admitted by the Company to be in its hands, as due and owing to the defendants, M. Healey & Co. On the contrary, any presumption to this effect is repelled by a statement made in a letter of said Breckenridge, dated on the 12th day of December, 1871, and addressed to the counsel of the plaintiff: he says, "you are mistaken in supposing that this company considers itself liable for the debts of the firm of M. Healey & Co., formerly contractors on section one hundred and twenty-one." This letter then proceeds further to indicate how the money

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arising from the final estimate of the work done by Healey & Co., will be used in the payment of their debts. But this action, on the part of the Company, under the previous statement contained in the letter, must be regarded as purely voluntary, and not proceeding from what was regarded on its part, as any legal obligation. This is all the evidence bearing upon the inquiry, directed by the statute, introduced by the plaintiff; and we do not see that it is of sufficient weight so justify the judgment of the court.

On the part of the garnishee, the deposition of Cabell Breckenridge is introduced, who says that Healy & Co. abandoned their work on 15th of November, 1871; had executed no release for their final estimate; that if they had complied with their contract, there would have been due them something under \$1,000 that the Company had tried to re-let the work. An extract from the contract between the garnishee and M. Healy & Co. is also introduced, and the witness Breckenridge says that if Healy & Co. had complied with this contract, there would have been due them something under \$1,000. The evidence does not show of what this sum of little less than \$1,000 consists, nor is the fact very material; we infer, however, from the terms of the contract, and the evidence, that it consists of the amount reserved by the company upon the monthly estimates, and the value of the work done from the first to the fifteenth of November. The contract contains the following provisions in substance: that on or about the first day of each month, during the progress of the work, an estimate shall be made of the value of the work done, and ninety per cent. thereof (if the amount due on said estimate shall exceed \$300) paid to the contractor, and upon the completion of the entire work a final estimate shall be made, and the balance appearing due shall be paid to the contractor, upon his giving a release to the company from all claims or demands growing in any manner out of the agreement; that if the contractor shall fail to pay the wages of the laborers for any month, that the engineer

may provide for their payment out of the estimate for that month; that the work embraced in the contract shall be commenced within — days from the date, and prosecuted with such force as the engineer shall deem adequate to its completion within the time specified; that if the contractor shall refuse or neglect to prosecute the work with a force sufficient in the opinion of the engineer, for its completion within the time specified, the engineer or agents of the Company may proceed to employ such a number of workmen, &c., as may in his opinion be necessary to insure the completion of the work within the time limited; pay all persons so employed, and charge over the amount so paid to the contractor, as for so much money paid to him on the contract; or the engineer may, at his discretion, for any omission or neglect on the part of the contractor, declare the contract, or any portion or section, abandoned, which declaration and abandonment shall exonerate the Company from any and all obligations and liabilities under the contract; and that the reserve per centage of ten per cent. upon any work done by the contractor, or as much thereof as, in the judgment of the chief engineer, as will be necessary for the complete indemnity of the Company may be retained forever by said Railroad Company. This contract and the deposition of Breckenridge present all the evidence on the part of the garnishee. The evidence of the witness Breckenridge, that the defendants had abandoned the work, and that if they had complied with their contract, there would have been due to them something under \$1,000, certainly does not prove any indebtedness on the part of the garnishee at the time of the service of the attachment. This can hardly be pretended. How then does this matter stand under the *provisions of the contract hereinbefore cited*, is the only remaining question? As before observed, the inquiry directed by the statute, under the suggestion of the plaintiff is, as to "such debts and effects," as may be in the hands of the garnishee. Were there any debts or effects in the hands or this Company,

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due or belonging to the defendants under this contract on the 8th of December, 1871? We have seen what the provisions of the contract are, and that the defendants abandoned the work. Upon such abandonment or failure, the Company was at liberty to employ such a number of workmen, laborers, &c., as might be necessary to insure the completion of the work within the time limited, and pay all persons so employed, and charge the amount so paid to the contractor. And if the contractor failed to pay the laborers for any month, the Company could pay the same out of the monthly estimate due to the contractor; or at its discretion, the Company could proceed, through its engineer, to declare the contract abandoned, &c. These provisions indicate the relations between the garnishee and the defendant when the order of attachment was served; under these relations, is there such an indebtedness on the part of the garnishee as is the subject of attachment?

A fundamental principle is, that an attaching creditor can acquire no greater right in attached property than the defendant had at the time of the attachment. If, therefore, the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it, as to permit him to dispose of it adversely to others, it cannot be attached for his debt. Drake on Attachment, section 245 and cases there cited. Again the debt from the garnishee to the defendant, in respect of which it is sought to charge the former, must, moreover, be absolutely payable, at present, or in future, and not dependent on any contingency. If the contract between the parties be of such a nature, that it is uncertain and contingent, whether anything will ever be due, in virtue of it, it will not give rise to such a credit, as may be attached; for that cannot properly be called a debt, which is not certainly, and at all events, payable, either at the present, or some future period. So, where a contract existed between the garnishee and the defendant, by which the defendant

was to be employed by the garnishee in a manufactory, for a salary, and was to deposit with the garnishee \$300 to indemnify him against loss in the business, and upon dissolution of the contract, so much of the sum deposited as should not be required to indemnify the garnishee against loss was to be repaid to the defendant, *it was held* to be uncertain and contingent, when the garnishee was summoned, whether the defendant would ever be entitled to recover the \$300 deposited, and that therefore the garnishee was not liable. Drake on Att., section 551 and cases there cited. The principle, thus stated, is illustrated and applied in the case of *Baltimore and Ohio Railroad Co. v. Gallahue's Admr.*, 14 Gratt., 563. In that case, by the terms of the agreement, monthly estimates of the work to be done, by the contractor, were to be made up to the 20th of each month, when they are considered due. As the price of the work done by the contractor after the 20th may be forfeited to the company for several causes, before the 20th of next month, no debt is due from the company to the contractor, until the 20th arrives: and therefore an attachment being served on the company on the 14th of the month, there is nothing then in its hands, due to the contractor, which may be attached, though in fact no forfeiture occurs, and on the following 20th of the month, the amount of the estimate may be due. Judge Samuels, delivering the opinion of the court says, in that case, "the performance of labor by Crowley (the contractor) for the garnishee, after the 20th of December, 1851, and before 14th of January, 1852, did not of itself put the garnishee in the condition of debtor to Crowley;" for, he adds, by the "terms of the contract, if Crowley should not well and truly, from time to time, comply with and perform all the terms therein before stated and stipulated, on his part, in manner and form and within the time therein mentioned, (after reciting other provisions of the contract not necessary here to repeat) the chief engineer should have power to annul the contract, if he saw fit to do so, when

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the agreement on the part of the company should become null and void, and the unpaid part of the value of the work done should be forfeited to the use of the company. Now it will be observed that the attachment, in this case, was held to be of no validity, not because the contract had been annulled, and become void, and the value of the contractor's work forfeited to the company ; for these things never did occur, but simply because provisions to that effect were contained in the contract, which might, owing to the failure of the contractor, be enforced against him. For the court says, "Thus, at the time of service of the attachment, 14 January, 1852, it was, (owing to the terms of the contract thereinbefore stated) uncertain and dependent upon future events, whether any amount whatever would be due for labor performed between the 20th of December and 14th of January." It thus appears, that simply because of the existence of these terms or provisions in the contract, and not because of their enforcement in any way, the attachment was not operative against the company at the time of its service.

In the contract under consideration here, it is provided, that if the contractor fail in performing the stipulations of the agreement, on his part, in the particulars therein stated, the Company may proceed to do the work, and charge over the amount to the contractor ; or, through its engineer, declare the contract abandoned, and the same shall thereby become void, and, and the reserved per centage of ten per cent. upon any work, &c., or as much thereof, as in the judgment of the chief engineer will be necessary for the complete indemnity of the Company, may be forever retained by said Company. Such in substance are the provisions of the contract here, and as there is {no evidence in the record showing that the same has ever been declared abandoned by the Company, and rendered void in any way, it was a subsisting contract between the parties at the time of the service of the attachment. Consequently it was then uncertain and dependent upon the future action of the Company, under

the provisions of the contract, whether there ever would be anything due to the contractor, for the work done during the month of November. Owing to his failure to fulfil the contract, the Company might incur more expense than his work was worth, in having it finally completed, and having the amount charged over to him. On the other hand, the Company was at liberty, at that time or afterwards, to declare the contract abandoned, and rendered void, and so far as we can know, the reserve per centage of ten per cent. then to be retained by the Company, might not be adequate, or more than adequate, for its complete indemnity. In either view of the possible action of the Company, under the terms of the contract, the value of the work done by the defendants M. Healey & Co., or the amount of estimates remaining in the hands of the Company, do not seem to have been properly the subject of the attachment, at the time of its service.

The subsequent voluntary course of the Company, in paying certain debts of the defendants cannot change the legal effect of the attachment, in giving it a force, which it did not have at the time of the service.

There is still another view of this proceeding. The contract provides that monthly estimates shall be made about the first of each month, during the progress of the work, of the value of the work done, of which ninety per cent. shall be paid to the contractor, leaving ten per cent. in the hands of the Company, and upon the completion of the entire work, a final estimate should be made, and the balance appearing due paid to the contractor, upon his giving a release to the Company from all claims or demands growing out of the agreement.

In the case of *Hennessy v. Farrell*, 4 Cush. (Mass.) 267, a railroad contract contained a similar provision, so far as the making of monthly estimates, and the retaining of a certain amount, and the making of a final estimate upon the completion of the entire work, with that con-

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tained in the contract here ; the facts also were similar to the facts in the case before us, as to the work of the contractor, for a part of a month, and his failure to proceed therewith ; and it was sought there, as here, to subject any funds in the hands of the Company, or its trustees, to the payment of a debt due by the contractor. Chief justice Shaw said, "as to part of a month's work, not completed, nothing had been earned. By the terms of the contract, it was entire for each month, and unless the work was continued until the end of the month, the defendants were not entitled to have an estimate made by the engineer.

As to the one quarter part of the nominal amount earned in former months, (referring to the reserved amounts,) it was payable only upon the completion of the entire work contracted to be done, and as this never was done, this quarter part, therefore, never became a debt due, which ought to be charged by the "trustee process." Applying these views to the case in hand, there was nothing earned by the defendants for the work done in the month of November, and the reserved monthly per centage remaining in the hands of the Company, never became a debt which could be charged under the attachment.

We have carefully endeavored to consider the suggestion of counsel, that the garnishee in this case, is estopped from setting up defence to this order of attachment. We have failed to see, however, in the evidence, any act of the Company, which misled the plaintiff to his prejudice, or caused him to waive, to any extent, his rights under the process taken. The Company was informed by the plaintiff through his counsel, on the third day after the service of the process of attachment, by a letter addressed to its agent, that he would "release the same and dismiss the suit, when the debt and costs of said suit were paid, but not otherwise." The Company has done nothing to induce him to pursue a different course. We

see no room for applying the doctrine of estoppel in the present case. 1874.  
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For these reasons, the judgment rendered against the Chesapeake and Ohio Railroad Company, on the 16th day of June, 1873, is set aside and reserved, with costs to the appellant, and this Court proceeding to render such judgment as the court below ought to have rendered, doth adjudge and order, that the Chesapeake and Ohio Railroad Company, be discharged from all claim or liability to the plaintiff, Samuel Strauss, by reason of the order of attachment in the proceedings mentioned, and recover from said plaintiff his costs in the circuit court expended, and that this order be certified to the circuit court of Kanawha county.

Haymond, President, and Moore, Judge, concurred.  
Absent Hoffman, Judge, by reason of sickness.

JUDGMENT REVERSED.

## CHARLESTON.

## RITTENHOUSE v. HARMAN.

March 2, 1874.

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1. Under the act of the Legislature on the subject of attachments, passed in 1867, an affidavit that the affiant "thinks" the plaintiff ought to recover the sum claimed, is not equivalent to an affidavit that he "believes" he ought to recover such sum; and is not sufficient to authorize an attachment.
2. Though a bill be multifarious, and but vaguely state the matter on which relief is sought, consent by the parties, to an interlocutory decree that the cause be referred to a commissioner, to audit, state and settle an account of the amount due each of the plaintiffs, is a waiver of any objection to such irregularity; and a demurrer thereafter, for such cause, is properly disallowed.
3. When the defendants are all non-residents of the State, and none have before appeared, the record of such consent by the parties, implies that all of the defendants appear and submit to the jurisdiction of the court.
4. When, apparently, two defendants, by counsel, petition for an appeal, which is allowed, and so appear and prosecute the appeal, though, on the hearing evidence is found in the case, tending to show that one was dead before the decree appealed from was rendered, yet, in this Court, it appearing that the decree is erroneous, and the other appellant having the right to prosecute the appeal and have the decree reversed as to both, the Court will not, of its own motion, institute an inquiry to ascertain whether the party be living; but will treat him as before the Court, by counsel, and reverse the decree, with costs to both appellants.\*

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\*The following is the act referred to in the syllabus:

Section one and three of chapter one hundred and fifty-one of the

An appeal by Othias Harman and Asa W. Thompson, <sup>1874.</sup> January Term.   
 from a decree of the circuit court of Wirt county, rendered on the 14th day of March, 1872, in a suit in chancery, therein pending, wherein William Rittenhouse and others were complainants and Othias Harman and others were respondents, all of whose names appear in the decision of the Court. The facts sufficiently appear in the opinion of Hoffman, Judge.

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The Hon. James M. Jackson, judge of said circuit court, presided at the hearing below.

*John A. Hutchinson, Jr.*, for the appellants.

*Walter S. Sands*, for the appellees.

#### HOFFMAN, JUDGE :

It is necessary to state but a small part of what the record of this case contains, in order to develop the points decided.

Code of Virginia, second edition, are hereby amended and re-enacted so as to read as follows :

"1. When any suit is about to be, or is instituted, for the recovery of any debt or damages arising out of any contract, or to recover damages for any wrong, the plaintiff may have an order of attachment against the property of the defendant on filing with the clerk of the court in which such suit is about to be, or is brought, his own affidavit or that of some credible person, stating the nature of the plaintiff's claim, that it is just, the amount the affiant believes the plaintiff ought to recover, and the existence of some one or more of the following grounds for such attachment,

*First*—That the defendant, or one of the defendants, is a foreign corporation, or is a non-resident of this State ; or

*Second*—Has left or is about to leave the State with intent to defraud his creditors ; or

*Third*—So conceals himself that a summon cannot be served upon him ; or

*Fourth*—Is removing, or is about to remove his property or a part thereof out of this State with intent to defraud his creditors ; or

*Fifth*—Is converting, or is about to convert his property or a part thereof into money or securities, with intent to defraud his creditors ; or

*Sixth*—Has assigned or disposed of his property, or a part thereof, or is about to do so, with intent to defraud his creditors ; or

*Seventh*—His property or rights in action which he conceals ; or

*Eighth*—Fraudulently contracted the debt or incurred the liability for which the suit is about to be, or is brought.

The affiant shall also state in his affidavit all the facts upon which he relies to show the existence of the grounds upon which his application for the attachment is based. The order may be made at the



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In January, 1869, William Rittenhouse, C. D. Morrill, Benjamin Flint and B. P. Flint, sued out of the clerk's office of the circuit court of the county of Wirt, a summons in chancery against Othias Harman, Daniel Dutsman, Thaddeus A. Mitchell, Jonathan Sherman, A. W. Thompson, Addison Pearson, George L. Wolfe, Edward L. Brockwalter, John J. Throckmorton, Samuel L. Wallace, Milton L. Clark, Mary Sifford and Lewis W. Sifford, her husband, John M. Snyder and — Hamlin.

And the plaintiffs filed an affidavit of Rittenhouse, in which he makes oath, that the suit is instituted for the purpose of settling up a partnership previously existing between the parties, and for the collection of the sum of \$1,162.50, with interest due the complainants Morrill and Rittenhouse; and that affiant thinks they ought to recover at least that sum, with interest and costs, and that the same is justly due. On the summons was endorsed, a recital that the affidavit had been filed, and an order that the sheriff attach the real and personal estate of the defendants, (except that of Throckmorton and Buckwalter,) in the county of Wirt, sufficient to pay the sum of \$1,162.50, with interest and costs, and report the proceedings.

commencement of the action, or at any time after, and before judgment. It shall be issued by the clerk and may be in form or effect as follows:

|                   |                        |
|-------------------|------------------------|
| A. B., plaintiff, | } Order of attachment. |
| vs.               |                        |
| C. D., defendant, |                        |

The plaintiff in this cause having filed his affidavit, as required by law, the sheriff or any constable of the county of — is hereby required to attach the estate of the defendant sufficient to pay the sum of — dollars and the costs of this suit, and make return of the proceedings under this order to the next term of the circuit court of the county of — Witness, E. F., clerk of said court, this — day of — 18 —

E. F., Clerk.

If the plaintiff files the bond and security required by law to authorize the officer levying the attachment to take possession of the property levied upon, that fact shall also be stated in the order."

"3. On the application of any person by himself or his agent to any justice, whether his claims is payable or not, for an attachment against the estate of his debtor, accompanied by the affidavit provided for in the first section as amended by this act, and also showing at what time the same is payable, the justice shall issue an attachment against the estate of the defendant, for the amount stated in said affidavit."

And the sheriff returned that on the fourth pay of January 1869, he attached all the right, title and interest of the defendants—naming them—(except Throckmorton and Buckwalter) in and to an oil lease on the land of the Rathbone Oil Tract Company in the county of Wirt, known as the “Cozzens lease,” and a steam engine on the lease, and all the stock and interest of each of the defendants in the Ross County Oil Company.

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The plaintiffs filed their bill, in which they allege that in October 1866, they, with the defendants, (except Lewis W. Sifford and Hamlin)—naming the others conjointly purchased a leasehold estate in a tract of land in the county of Wirt, containing about four acres, and a steam engine and fixtures thereon, and a lease known as the Cozzens's lease, and a steam engine and fixtures thereon, for the sum of \$12,500, and that the parties held different, undivided, interests in the property—Rittenhouse eight fortieths, Morrill four fortieths, Harman four fortieths, Thompson one fortieth, and the other parties to the suit (except Lewis W. Sifford and Hamlin) interests which were specified: And that each of these paid their respective portions on the leasehold estate: That in November, 1866, they sold two leases on the tract of land mentioned, each containing five eighths of an acre, to a corporation formed under the laws of Ohio, named the “Ross County Oil Company,” and by deed dated in January, 1867, Rittenhouse, for himself, and as trustee for the other owners, conveyed the same to the Company, for the sum of \$25,000, of which \$5,000, was retained as working capital, and \$20,000, paid to the owners—about one half in cash and the residue in stock of the Company, which was divided into shares of \$100: That each of the owners received the following several amounts: Rittenhouse, \$1200, in money and twenty-eight shares of stock; Morrill, ten shares of stock; Harman, \$1000, in money and ten shares of stock; Thompson, five shares of stock; and the other owners amounts specified; the whole of which amounted to \$19,000: That all the joint

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owners received their respective proportions, except Morrill, who received only ten shares of stock—and no money: That Rittenhouse paid a claim to James Ballinger, amounting to \$250, which was against the property at the time of the original purchase, and was to be paid by the purchasers: That Buckwalter and Throckmorton sold their interest remaining in the original lease to Hamlin, after the lease was made to the "Ross County Oil Company;" and that Mary Sifford is the wife of Lewis Sifford:

That all the defendants are non-residents of the State, but own property both real and personal, in the county of Wirt; and that the plaintiffs have caused an attachment to issue, by virtue of which the sheriff has attached all the right, title and interest of the defendants in and to an oil lease on lands of the Rathbone Oil Tract Company.

The plaintiffs pray that the parties heretofore mentioned as defendants—naming them—be made such, and be required to answer; that an account be taken of the amount paid in, and received by each of the parties, and the amount due the plaintiffs, and each of them; that the property attached may be sold to satisfy the plaintiffs' claim, and that they may have general relief.

With the bill, as exhibits, are filed a copy of a deed dated in December, 1866, from Norman Peck to Rittenhouse, for a two-tenths interest in the agreement of lease mentioned in the bill, in his, Rittenhouse's own right; and to him, as trustee, the remaining eight tenths interest, subject to agreements in the original leases, for the benefit of the respective parties; and a copy of a deed dated in January, 1867, from Rittenhouse, in his own right, and as trustee, as already stated, by which, in consideration of \$25,000, to him paid, as recited, he grants to the Ross County Oil Company, all the right, title and interest of himself, in his own right and for his *cestuis que trust*, in and to two separate parts of a tract of land situated in the Rathbone Oil Tract Company's land,

known as the Cozzen's lease, and another tract—each described by metes and bounds. The latter deed does not appear to have been properly authenticated, but no exception is taken to the reading of the copy as evidence of the execution and contents of the paper.

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In term, in August, 1869, by the consent of the parties, it was adjudged, ordered and decreed, that the cause be referred to one of the commissioners of the court, to audit, state and settle an account of the amount paid in and received by each of the parties to the suit, and the amount, if any, due the plaintiffs, and each of them; and that the commissioner should give notice as required by law, of the time and place of executing the decree.

The commissioner made a report, which was excepted to.

In November, 1869, the parties came, and the defendants moved the court to quash the attachment: And the commissioner's report was set aside and recommitted:

The commissioner made another report, which was excepted to.

The defendants demurred to the bill for multifariousness, and for other causes.

In March, 1870, the cause being heard, the demurrer was overruled, and the commissioner's amended report was set aside, and the cause was again referred to Lockhart, another commissioner.

This commissioner made a report in which it was stated that Rittenhouse, as trustee, sold and conveyed a portion of the lease to the Ross County Oil Company, for the sum of \$25,000, one half of which was paid in money, and the residue in stock of the Company at \$100 per share; that \$5,000 was set aside as a working capital, and the residue was to be divided among the purchasers from Peck, according to their interests; and that Rittenhouse received twenty-eight shares of stock and \$1,200 in money, equivalent to \$4,000; Morrill ten shares of stock, equivalent to \$1,000; Harman ten

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shares and \$1,000, equivalent to \$2,000; and Thompson five shares, equivalent to \$500; and that the other parties, respectively, received their shares of stock and money; the aggregate of all which was \$19,000.

That each received his respective interest, in money or stock, from the Company, except Morrill, who was entitled to \$2,000: That Rittenhouse was entitled to recover from the parties named, \$250, paid by him for repairs and work on the leasehold estate—that he received thereon eighteen-fortieths, amounting to \$112.50, leaving a balance due him of \$138.50, with interest: That the indebtedness of the defendants to Morrill, was \$1,000, with interest.

The defendants excepted to the report, because the commissioner did not charge Rittenhouse and the other plaintiffs with their ratable proportions of the indebtedness.

In January, 1873, the cause being heard, the motion to quash the attachment, and the exception to the commissioner's report, were each overruled; and it was decreed that the plaintiff, Rittenhouse, recover of the defendants the sum of \$138.56, with interest; and that the plaintiff, Morrill, recover from the defendants the sum of \$1,000, with interest; and that the plaintiffs recover costs.

Harmon and Thompson obtained an appeal to this Court.

The act of the Legislature, in force when the attachment issued, (Acts 1867, ch. 118,) contained this provision:

"When any suit is about to be, or is, instituted, for the recovery of any debt or damages, arising out of any contract, or to recover damages for any wrong, the plaintiff may have an order of attachment, against the property of the defendant, on filing with the clerk of the court, in which the suit is about to be, or is, brought, his own affidavit, or that of some credible person, stating the nature of the plaintiff's claim, that it is just,

the amount the affiant believes the plaintiff ought to recover, and the existence of some one or more of the following grounds for such attachment." The act then specifies such grounds.

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It is desirable that the draft of an affidavit should suggest to the party to swear, not only the fact which he is about to verify, but, if not the evidence, at least the degree of conviction he is to assert. It is important that an affidavit to obtain an attachment, state, exactly, the belief of the fact required to be verified, or what is fully and plainly equivalent to it. The existence of evidence, the consideration of its credit and force, and the conviction of its sufficiency, are not implied in a statement that an affiant "thinks" a thing is true, to the same extent and in like degree that they are implied, in whole or in part, in a statement that he "believes" it is true. In this case the affiant merely swears that he thinks the plaintiffs ought to recover an amount specified; but, he does not state any amount which he believes either of the plaintiffs ought to recover. And, therefore, there was no sufficient ground for the attachment.

The bill alleges a sale by all the owners, and in one place indicates that the sum of only \$19,000 was paid; while in another place it indicates that the whole of the \$20,000 was paid; but, who gave the credit for the \$1,000, payable to Morrill, or why it was not paid, or if it was paid who received it, the bill does not state.

Previous to the consent decree for an account, entered in 1869, none of the defendants had been served with process, or appeared. The entry in the record reciting the consent of the parties to the suit, certainly implied that some defendants appeared. But, if it applied to any, it equally imported all that appeared.

Moreover, subsequent entries expressly show that the defendants appeared.

Whether the bill was multifarious, or failed to allege the matters relied on with sufficient certainty or not, the

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defendants, by their consent to the interlocutory decree, waived any objection on such account, and submitted to the jurisdiction of the court; and at the taking of the account, either of the plaintiffs might prove any of the matters alleged in the bill or growing out of such matters, covered by the consent, that would entitle him to relief. After that consent the defendants could not demur availably.

The commissioner's statement, on its face, is defective, equivocal and erroneous. He states the amounts received by the different parties from the Ross County Oil Company, and the aggregate, \$19,000; thus indicating that the \$1,000 was never paid by the Company; and he states that each of the persons, except Morrill, received his respective share: Yet he charges the whole of that sum, with interest, to the defendants, jointly. And the commissioner states that of \$250, paid by Rittenhouse, he received \$112.50; leaving a balance of \$138.50—in fact \$137.50: Yet he charges the whole to the defendants, jointly.

It is not necessary to speak of error to the prejudice of defendants who do not appeal or ask a reversal. Their fate will be determined here by that of those who do appeal.

Neither the allegations of the bill, nor the evidence, nor the report, warrant the final decree.

Evidence in the case indicates that probably Harman was dead before the rendition of the final decree. But it is manifest that, whether he was living or dead, the decree ought not to stand. If the appeal were abated or dismissed, as to Harman, Thompson alone might prosecute it, and obtain a reversal of the joint decree, as to both. Under other circumstances, upon the evidence before it, this Court might of its own motion, institute an inquiry as to whether at the time of petitioning, Harman was alive: But such inquiry by the Court in this case, is not necessary to the attainment of justice;

and no party has properly moved for its institution. And inasmuch as, by the petition, it appears that Harman lives and, as well as Thompson, by counsel, here prosecutes his appeal, on the hearing the Court regards him as so present.

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For the reasons stated the decree of the circuit court of Wirt county, rendered on the 14th day of March, 1872, is reversed, with costs to the defendants against the plaintiffs in the circuit court, the attachment is quashed, and the property on which it was levied is discharged; and the report of Lockhart, commissioner, is set aside, and an account, according to the consent decree of reference is ordered to be re-audited, stated and reported.

The other Judges concurred.

DECREE REVERSED AND ATTACHMENT QUASHED.



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|----|-----|
| 7  | 390 |
| 34 | 120 |
| 7  | 390 |
| 37 | 806 |
| 7  | 390 |
| 39 | 814 |
| 7  | 390 |
| 40 | 558 |
| 7  | 390 |
| 41 | 458 |
| 7  | 390 |
| 53 | 435 |
| 7  | 390 |
| 57 | 47  |
| 57 | 65  |
| 7  | 390 |
| 58 | 72  |
| 58 | 172 |
| 7  | 390 |
| 62 | 250 |
| 62 | 637 |

## CHARLESTON.

## DICKINSON v. RAILROAD COMPANY.

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1. Although, "every material allegation of the bill not controverted by answer, shall for the purposes of the suit be taken as true, and no proof thereof shall be required" as provided by section 36 of chapter 125 of the Code of West Virginia, still, if one defendant does controvert the material allegations of the bill, by his answer, and his interest may be affected by the truth of such allegations, the failure of another defendant or defendants to do so, does not dispense with the necessity of proof, as to such allegations, as to the defendant who does controvert them, by his answer.
  2. Section 5 of chapter 130 of the code of 1868 of West Virginia applies only to the records of courts held within the State.
  3. An abstract as applied to records ordinarily means a mere brief, and not a copy of that from which it is taken, and a paper writing being only an abstract of an alleged judgment, and attested as an abstract, although attested by the clerk of the court in which the judgment was rendered, cannot ordinarily be read as proof of the alleged judgment, where the existence of the judgment is denied.
  4. Where a judgment or decree is obtained for a debt, in a proceeding in chancery to enforce the lien of such judgment or decree against lands, ordinarily, it is not necessary that a complete copy of the whole record of the case in the court in which the judgment or decree was had, should be produced or filed, but only a properly authenticated copy of such judgment or decree.
  5. In such case a copy of the judgment is an extract from the record of the cause, and not a complete copy of the whole record, and being an extract from the record, and a copy of the judgment, as entered, it may be read as evidence in the cause.
  6. In such case where the fact to be shown is merely that a decree or

judgment has been rendered proof of the other proceedings ordinarily, (though perhaps not universally,) will not be necessary, but the adversary party will be at liberty to show any other matter in the record which may avoid the effect of that which is introduced.

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7. An authenticated copy from the Recorder's docket of an official abstract of a judgment docketed under the provisions of the 3rd and 4th sections of chapter 139 of the code of 1868, of West Virginia, is evidence that such abstract was docketed, and when, and of notice to purchasers of lands upon which the alleged judgment is claimed to be a lien, when the existence of such judgment is properly proved; but where the judgment is put in issue, ordinarily, an authenticated copy of such abstract, as docketed by the Recorder, will not be received as proof of the judgment and dispense with the necessity of producing a properly authenticated copy of the judgment.
8. Section 5 of chapter 130 of the code of 1868 of West Virginia, applies as well to the records of the District Court of the United States, held within this State, as to the records of the courts of this State; and a copy of a judgment rendered in the District Court of the United States, in this State, attested by the clerk of such Court, according to the provisions of said last named section and chapter will ordinarily be received as evidence of the existence of such judgment.
9. The 19th section of chapter 130 of the Code of 1868, of West Virginia, does not apply to the records and judicial proceedings of the District Court of the United States, held within this State,
10. Where the contract for the purchase of land, by the Chesapeake and Ohio Railroad Company, provides that the purchase money is to be "paid in eight per cent preferred stock of the Chesapeake and Ohio Railroad Company;" and the court in decreeing execution of the contract decrees that the company issue and deliver in payment of the purchase money, its stock *guaranteed to pay eight per cent thereon*, IT IS ERROR.
11. In a suit in equity, to sell land to satisfy a judgment lien, or to enforce the payment of the purchase money, if it appears that there is a prior lien for unpaid purchase money on the land, those entitled to the benefit of such prior purchase money lien, should be made parties to the suit.
12. Three persons are chosen by the vendor and vendee of land to ascertain and fix the value of the land and to certify such valuation; in such case the certificate of valuation cannot be considered as more solemn, conclusive or binding upon the parties than an award—it is but an award, and the referees, or persons chosen, cannot, upon principle, be considered otherwise than as arbitrators.

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13. It is, ordinarily, in equity, though, perhaps, not universally, misconduct in arbitrators chosen out of court to determine and award as to the matter or matters referred to them, in the absence of either party in interest to the submission, his agent or attorney, without notice being previously given to such absent party, his agent, or attorney, of the time and place of their proceeding to hear and determine the matter submitted, unless such absent party, not having notice, has dispensed with or waived such notice, or the like; and for such misconduct a court of equity may, ordinarily, set aside the award, at the instance of either party materially interested, not having such notice, and who was absent.
14. An award procured by the fraud and imposition of one of the parties to the submission, will be set aside for that cause, by a court of equity, in a proper case.
15. Though the simple fact that one of the parties to the submission wrote the award, in the absence of the other, who was not notified of the time and places of the arbitrators proceeding to make their award, may not, of itself, be sufficient to invalidate the award, still it may be considered, unexplained, as affording just ground for suspicion and criticism. But where such party, in such case, wrote the award, and so wrote it that it is materially erroneous and deceptive, in his favor, and the arbitrators did sign it, as written, a court of equity may set aside the award.
16. When the value of property in money is referred to arbitrators and they fairly execute the submission, generally, the award cannot be set aside or determined to be invalid upon the ground that the valuation is exorbitant.
17. Where a party intentionally or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in such case, there is a positive fraud. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead as well as by positive assertions.
18. If a party, for a fraudulent purpose, states a fact which is untrue, and without knowing it to be true, and he does not, at the time, believe it to be true, this is both a legal and a moral fraud. And where the representation, expressly or impliedly, forms a part of the contract between parties, it is not essential, in order to invalidate the contract, that there should have been a moral fraud.
19. If, upon a sale, the vendor makes material representations of matters of fact, as of his own knowledge, and they are in fact untrue, and the vendee is deceived thereby, the sale will be voidable, although the vendor did not know whether they were true or not.

20. Generally, though perhaps not universally, a cross-bill is considered as a defence to the original bill, or a proceeding necessary to a complete determination of a matter already in litigation.\*

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An appeal from a decree of the circuit court of Greenbrier county. The facts are stated, at length, in the opinion of the Court.

The Hon. Joseph M. McWhorter, judge of said circuit court, presided at the rendition of the decree below.

*John B. Baldwin*, of Virginia, and *Robert F. Dennis*, for the appellant.

*Samuel Price*, for the appellee Dickinson, the complainant below.

*John W. Harris* and *Adam C. Snyder*, for Rucker and others, appellees.

\*The following are sections five and nineteen of chapter one hundred and thirty; sections three and four of chapter one hundred and thirty-nine, and section thirty-six of chapter one hundred and twenty-five, of the Code, referred to in the opinion of the Court.

"36. Every material allegation of the bill not controverted by an answer, and every material allegation of new matter in the answer constituting a claim for affirmative relief, not controverted by a reply, shall, for the purposes of the suit, be taken as true, and no proof thereof shall be required."

"5. A copy of any record or paper in the clerk's office of any court, or in the recorder's office of any county, or in the office of the secretary of the state, treasurer, or auditor, or in the office of surveyor of lands of any county, attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original. The certificate of the auditor of the fact and time of the return of any real estate as delinquent, or of the sale thereof for taxes, shall be *prima facie* evidence of what is stated in such certificate. Any such copy or certificate purporting to be sealed, or signed and sealed, or signed alone, by any such officer, may be admitted as evidence without any proof of the seal or signature, or of the official character of the person whose name is signed to it. The certificate of the auditor of the payment or non-payment at any time of taxes on forfeited or delinquent lands or of their not having been entered on the books of the assessor of the county or counties wherein the same were chargeable with taxes, shall, in any suit in relation to such lands, be *prima facie* evidence of what is stated in such certificate, provided it be filed with the papers of said suit, and notice thereof be given to the opposite party or his attorney, at least twenty days before the first day of the term at

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Dickinson, the complainant, filed his bill in 1870, against William P. Rucker, and the Chesapeake and Ohio Railroad Company, in the circuit court of the county of Greenbrier, in which he alleges that at the November term, 1869, of the district court of the United States, held at Kanawha Court House, in this State, he recovered a judgment against Rucker, now of Greenbrier county, for \$1,717.38, with interest as stated in the bill, subject to a small credit, and the costs of the suit. He professes to file with his bill, a copy of the judgment marked No. 1; that upon the judgment execution issued, and was returned by the Marshal *nulla bona*, and the whole remains unpaid; that at the time of the judgment, Rucker was the legal owner of various tracts of land in the Bend of Gauley river, Nicholas county, on which he then resided, all adjoining each other, and

which it is to be offered as evidence. When the certificate purports to be signed by the said auditor, it may be admitted as evidence without proof of his signature."

"19. The records and judicial proceedings of any court of the United States, or of any state, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, and certified by the judge, chief justice, or presiding magistrate of such court, to be attested in due form, shall have such faith and credit given to them in every court within this state, as they have in the courts of the state, territory, or district whence the said records come."

"3. In the following section the word "judgment" shall include any undertaking, bond, or recognizance which has the force of a judgment.

"4. The recorder of every county shall keep in his office, in a well bound book, a judgment docketed, in which he shall docket without delay any judgment in this state, when he shall be required to do so by any person interested, on such person's delivering him an authenticated abstract of it. In such docket there shall be stated, in separate columns:

1. The names of the parties;
2. The amount of the judgment;
3. The value of specific property, (if any), recovered by it;
4. The date of the judgment;
5. The court in which it was rendered;
6. The date of docketing it.

And it shall be the duty of the clerk of the court in which, or of the justice before whom, any judgment is rendered to include in the abstract thereof the foregoing particulars. Every judgment shall, as soon as it is docketed, be indexed in the name of each defendant therein. If a recorder fail to do anything required of him by this section, he shall pay a fine of not less than thirty nor more than three hundred dollars to any person who will prosecute therefor."

constituting one large tract of about one thousand and six hundred acres, or more; that he had made some executory contract with the Railroad Company, by which he was to have the stocks of the Company in exchange for the lands, to a large amount, but whether the contract is ever to be executed or not he (Dickinson) cannot tell; that Rucker held two other tracts of land in the same situation, one in Nicholas, and the other in Clay county; that before the judgment and execution, Rucker had settled all his personal property upon his wife; that the judgment bound all of Rucker's realty, and the execution his personalty, including his choses in action, so that if the contract with the Railroad Company was valid, the execution was a lien on the stocks, and if not, the judgment was a lien on the lands, either of which would be sufficient to pay the debt; that Rucker is still the owner of a lot in the town of Summersville, Nicholas, county, on which the old "Kelly's," tavern stood, and also of a house and lot in Greenbrier, where he now resides, which are also liable to the judgment; that Dickinson is not anxious to interfere with the contract of Rucker and the Railroad Company. He, however, desires to reach, either the lands or the stocks and to have the question settled between Rucker and the Railroad Company, as to whether the contract between them is valid or not, and if he is to go against the stocks, he desires to enforce his execution lien against them in the hands of the Company. And he prays that the lands may be sold, if the sale to the Company is not valid and binding, to pay his debt, &c.; and if valid and binding that the stocks may be issued, and sold to pay the debt, &c. The bill also contains a prayer for general relief.

Rucker, in his answer, says, that at the date of the judgment rendered against him, in the bill mentioned, he was not, nor is he now, either the legal or equitable owner, of the lands in the bill referred to, nor is he entitled to any of the proceeds arising from the sale thereof; that on the 20th of June, 1868, he entered into a

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written contract with the Chesapeake and Ohio Railroad Company, through J. A. Alderson, their authorized agent, for the sale of the lands first mentioned in the bill, as lying in Nicholas and Clay counties, and, that it was therein stipulated and agreed, that the stock to be issued in consideration thereof, should be issued to Cyrus P. Bryan, as trustee, for Margaret A., the wife of Rucker; that a deed conveying the lands, in pursuance of the agreement, was long before the date of the judgment, executed and delivered, by Rucker, to the vendees, and was duly admitted to record on the — day of October, 1868, in the Recorder's office of the counties where the lands lie; that by the contract and deed, he, (Rucker,) intended to, and did, transfer and convey, for the benefit of his wife, the entire proceeds arising from the sale of the land; that this was done for "valuable, and a and good valuable consideration, and, if it had been only upon the latter, it was at a time when he had other real and personal estate, amply sufficient to discharge both his present and prospective indebtedness;" that the transaction was perfectly fair, and wholly without fraud, actual or constructive. He denies that he is the owner of a lot in Summersville, but says the lot was for a valuable consideration, in the year 1868, conveyed by him to Isaac Miller, by deed, of record in Nicholas county. He also denies that he is the owner of a house and lot in Greenbrier; but states, the house and lot were purchased by his wife, paid for out of her separate estate, and that the deed was made to her. He admits that he has no personal estate in this State; all that he had was long since conveyed by him, for valuable consideration, to Cyrus P. Bryan, for the benefit of his wife. By a general clause, he denies all the allegations of the bill, not admitted or denied in the answer. He files with his answer copies of the contract and deed to the railroad company.

In May, 1871, Dickinson filed an amended bill in the cause, and made Rucker, and his wife Margaret, Cyrus

P. Bryan, and the Chesapeake and Ohio Railroad Company defendants thereto. In the amended bill it is alleged, that the land embraced in the contract of the 20th of June, 1868, made between Rucker and the Railroad Company, was, at the date of the contract, the property of Rucker, and that the debt due Dickinson from Rucker was contracted prior to the date of the contract; that the house and lot, near Lewisburg, where Rucker resides, purchased of Hoover and wife and her trustee, and embraced in the deed from Hoover and wife and trustee to Rucker's wife and filed with Rucker's answer, were really purchased and paid for by Rucker; that on the day of — Rucker, by deed, conveyed to Bryan all his personal estate of great value, in trust to hold for the benefit of Rucker's wife, and the deed of conveyance is duly recorded in Greenbrier county; that Rucker has thus, in form divested himself of all property, real and personal, and settled the same upon his wife, to the prejudice of his creditors; that the deeds and contracts were voluntary, fraudulent and void, as to creditors; that the contract with the Railroad Company not having been recorded, so far as it attempts to convey the stock to Bryan, for the benefit of Mrs. Rucker, is, for that reason, void; that the Railroad Company, by the contract, bound themselves to deliver, a large amount of 8 per cent. preferred stock to Bryan, for Mrs. Rucker, within 3 months from the 20th of June, 1868, and the stock has not been so delivered, nor has it been delivered to any one, though long since due. And the bill charges that the stock is liable to Dickinson's execution, and can be arrested, and sold for the payment of his debt; and that the Hoover property is liable, as well as the personal property conveyed in trust to Bryan. The bill prays that the Railroad Company be required to issue the stocks and and place the same in the hands of a receiver of the court to be sold to pay the debt; that the house and lot, and the other personal property be sold for the same purpose; that all of said deeds, and contracts may

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set aside, and declared void, and, that such other and general relief be granted as comports with equity.

On the 25th day of November, 1871, the Chesapeake and Ohio Railroad Company filed its answer to the original and amended bills. The early part of the answer contains a general demurrer to the bill and amended bill. In the answer the Railroad Company substantially states, and alleges, that it has no knowledge of the property or business of Rucker, or of any of the arrangements, or dispositions alleged to have been made by him in respect to the conveyance or settlement thereof, except as to the contract, and conveyance purporting to have been made by Rucker with it; that it knows nothing of the judgment claimed by Dickinson against Rucker, or if its consideration or validity or of the steps taken, or proceedings had for its enforcement; that so far as any of the allegations of the bills are relied upon to affect its rights or interests or as the foundation of any decree in the cause, it controverts them all, and calls for proof of each allegation, except so far as the same is expressly admitted to be true; that it admits that a contract was made between Rucker and it, dated June 20, 1868, a copy of which is filed with Rucker's answer to the original bill; that it knows nothing of the motives or purposes of Rucker, as affecting the rights of his creditors, in the making of the contract; nor does it know anything of the consideration upon which the issue of the stock, provided for by the contract, was directed to be made to Bryan, in trust for Rucker's wife; that if it has been made a party to a contract, having for its purpose a fraud upon creditors, it was done without any knowledge on its part of such purpose; that it has thus far declined to carry into effect the contract of June 20, 1868, having been engaged in investigations in relation to the revoking of the same—the valuation purporting to have been made under it, the survey alleged to have been made for ascertaining the quantity of land, and the title of Rucker to the lands; that pending the investi-

gation negotiations have been going on between it and Rucker looking to a rescission of the contract upon terms satisfactory to the parties; that the negotiations have failed; that it is unwilling, specifically, to execute the contract, for the following reasons: The contract embraces three tracts of land—that the Bend of Gauley tract is described in the contract as “containing two thousand acres, more or less, the exact number of acres to be ascertained by the county surveyor at the earliest day practicable, and certified by him on the back of this agreement;” that J. Haymond Robinson, surveyor of Nicholas county, certifies in an indorsement upon the contract that by calculation he finds the Bend of Gauley farm in the within contract to contain one thousand eight hundred and sixty-six acres of land, including one half the width of Gauley river, from a water birch on the bank of the same, a distance of eight hundred and sixty poles, allowing the half width of the river to be eight poles;” that the ascertainment of the amount of acres is not based upon actual survey, but on calculation in lieu thereof, and is incorrect, and if the contract is to be executed at all it insists, that the true quantity of the land shall be ascertained by actual and correct survey, and that it shall have fair notice of the making of the survey, a privilege not extended to it by the surveyor in his operations; that the contract of June 20, 1868, provides for a sale of the “Bend of Gauley,” “at so much per acre as may be determined by Messrs. George Brown, Samuel T. Grose and Joseph Copenhaver, being disinterested and responsible landowners, in the said county; the price per acre, so determined, to be certified by them, on the back of this agreement;” that Brown, Grose and Copenhaver, professing to act under this provision, on the 6th of July, 1868, certified on the back of the agreement “that having carefully examined Dr. Wm. P. Rucker’s Bend of Gauley plantation, in accordance with the provisions of the within agreement, referring the matter to us, hereby certify that the said tract is worth

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\$16.50 per acre ;” that it had no notice of the time and place of making the examination and valuation, and does not know who was present at it, or upon what representation, as to boundary or quantity, or what evidence as to the value, the valuers acted, and is advised that no such valuation can affect its rights ; that by the assessment of lands for taxation in Nicholas county in the year 1866, the assessment made last preceding the valuation, the “Bend of Gauley” tract, composed of eight several parcels, is assessed at an average of less than \$3.60 per acre, the highest value placed upon any parcel being \$5.65 per acre ; that this discrepancy is so great as irresistibly to raise the suspicion, if not the conclusion, of some great misrepresentation, mistake or fraud ; that at the date of the valuation and its endorsement on the back of agreement, there had been no ascertainment of quantity by a calculation, including not only the inaccessible cliffs of Gauley, but one half the bed of the stream ; that it is unwilling to stand to this valuation without having an opportunity to subject it to the tests of a most thorough and rigorous investigation ; that the contract declares as to all the lands included in it, “the titles to these tracts of land are all clear, and in no way encumbered, except there are some \$300 due, back money, on the Bend of Gauley plantation, which will be settled immediately ;” that there are several outstanding liens for purchase money upon different parcels of the “Bend of Gauley,” in addition to the \$300 referred to, and which has not been settled as promised by the contract ; that there are defects of title, of form and substance, affecting several of the parcels constituting the Bend of Gauley ; that as to one small tract Rucker owns only an undivided interest, and as to two others, and larger tracts, there is an outstanding dower right held by the wife of a vendor ; that these, and other defects of title, show the necessity of requiring from Rucker an exhibit and abstract of title, and a removal of such defects before allowing him, or any one for him, to have

specific performance of the contract ; that in addition to these matters, in the description of the "Bend of Gaulley," as to its condition of clearing, cultivation, and improvements, there was practised, by Rucker, the grossest deception and fraud ; that he exceeded the license allowed to the most excited vendor, and the puffing or commendation of his property tolerated by the law, in consideration of human infirmity, and resorted to misstatements of fact so glaring as to mark the whole transaction with fraud, such as a court of equity cannot tolerate ; that the title of the two hundred and fifty acre tract, in Nicholas, is subject to the outstanding dower right of a former proprietor ; that this land was sold to it in the description of Rucker at \$3 per acre ; but it is in fact utterly without value ; that the one hundred and seventy-five acre tract in Clay county has been sold for taxes which were assessed, and in arrear, before the contract of June 20, 1868 ; that the price at which this tract was sold, upon the representation and description of Rucker is \$11 per acre, and it is not worth one-fifth of that amount ; that it has learned that Rucker and wife have undertaken to make, and have placed on record a conveyance of these several tracts of land to it, a copy of which is filed with Rucker's answer ; that from the copy it appears that, though recorded, the deed was never delivered to it, but was delivered to J. A. Hamilton, merely as an escrow ; that it never accepted the conveyance, and is unwilling to accept it, and in fact the deed was never offered to it ; that the whole transaction connected with the contract of June 20, 1868, is one which, in all its features, is marked by fraudulent misrepresentation, to the prejudice of its rights, and that it resists the performance of the contract upon all the grounds stated, and upon all other grounds that may be disclosed upon the most thorough investigation ; that it is advised that the litigation of all these matters cannot be properly conducted in this suit, where the parties really litigant

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are all defendants, and where these matters are not, and cannot be, regularly put in issue; that it controverts all the allegations in the bills, not admitted by its answer to be true, and denies all fraud.

Rucker, in his answer to the amended bill refers to his answer to the original bill, and prays that it may be read as part of this answer. And he alleges that the deed of trust to Bryan of the 18th of December, 1868, was a fair and *bona fide* transaction; that the conveyance was made not only upon a valuable consideration, but also for an adequate consideration, and that the entire property, therein embraced, has long since been sold by the said trustee, and the proceeds applied to the payment of the claims of the creditors therein, and thereby, secured, and that all these transactions were had, and made, long before the recovery of Dickinson's judgment; that the settlement made upon his wife, in the contract with the Chesapeake and Ohio Railroad Company, was in consideration of a debt of some \$4,750, morally and legally due from him to his wife; and in the further consideration that she would relinquish her dower right and interest in the lands sold by him to the Company, as appears by a contract or deed entered into with his wife, and her trustee, Bryan, on the 27th of May, 1868, a copy of which is filed with the answer as exhibit (A.); that his wife, in consideration of the settlement, did, afterwards, relinquish her dower interest in the lands; that he denies that he bought or paid for the house and lot conveyed by Hoover and others, to his wife, except as agent only of his wife, and with her property and funds. He denies that any of the contracts and deeds referred to in the bills are voluntary or fraudulent. He denies that the contract with the Railroad Company is void for want of recordation, or for any other reason, and he, by way of conclusion, denies all of the allegations of law or fact, in complainant's bill contained, not before denied.

Mrs. Rucker and Bryan failed to answer the amended bill.

Rucker does not deny the allegation in the amended bill that Dickinson's debt was contracted prior to the 20th of June, 1868; nor does he deny the allegations in the bills, as to obtaining the judgment for the amount alleged, and at the date alleged, and the issuing of execution upon the judgment, and the return by the Marshal, of "no property found;" nor does he deny the allegation that he has divested himself of all property, real and personal, and settled, or had the same settled, upon his wife. The alleged copy of the judgment filed by Dickinson, and filed as exhibit No. 1, is as follows: "At a District Court of the United States, for the District of West Virginia, held at Charleston, the 29th day of November, 1869. Russell J. Dickinson *vs.* William P. Rucker, debt: Judgment for plaintiff for seventeen hundred and seventeen dollars, thirty-eight cents, with legal interest on seventeen hundred dollars, part thereof, from the first day of January, 1861, and like interest on \$17.38, the residue thereof, from the 29th day of November, 1869, until paid, and \$34.30, costs of suit. But this judgment is subject to a credit of \$62, paid the 22d day of October, 1860. A true abstract from the record. Teste: Jasper Y. Moore, Cl'k U. S. C't., D., W. Va." Upon this alleged copy, the counsel for the Railroad Company endorsed an exception on the 5th December, 1871, in these words: "This paper is excepted to by the Chesapeake and Ohio Railroad Company, as not being legal and sufficient evidence of the plaintiff's judgment *vs.* Rucker." Immediately below the certificate of acknowledgment of the alleged deed from Rucker and wife to the Railroad Company, and upon the deed is this writing: "I delivered this to John A. Hamilton, as an escrow, to deliver to the Chesapeake and Ohio Railroad, as my deed, upon condition, that said Company first pay you, as per contract between myself and said Company, bearing date June 20th, 1868, September 18, 1868." Signed: "William P. Rucker."

It appears, from the certificates of the Recorders of

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Nicholas and Clay counties, that the deed was admitted to record in Nicholas county, November 9, 1868, and in Clay county, November 25, 1868. On the 11th day of December, 1871, and before any parol evidence was taken in the cause, the court made this decree, to-wit: This cause came on this 11th day of December, 1871, to be heard upon the bill, amended bill, answers of the defendants, Wm. P. Rucker and the Chesapeake and Ohio Railroad Company, and an appearance by counsel, for the other defendants, without answer and service of subpoena on said defendants, against whom the bills are taken for confessed, replications to said answers, exhibits, exception to the plaintiff's exhibit No. 1, and arguments of counsel; upon consideration whereof, it appears to the court, that by virtue of the judgment and execution referred to in the bill, the plaintiff has a lien upon either the lands conveyed to the said Railroad Company, by the defendant Rucker, or upon the stocks to be issued by said Company, in consideration of said lands. But said Company having filed an answer, contesting the validity of said contract, which, in the opinion of the court, renders it proper for the said Company to file a bill for relief against said contract, so that the same may be set aside or affirmed, according to circumstances; it is therefore, adjudged, ordered and decreed, that said cause be continued, with leave to said Company to file a cross bill, praying a rescission of said contract; and, unless the same be filed in a reasonable time, and prosecuted with diligence, the court will proceed to render a decree enforcing said contract.

The Railroad Company, in pursuance of said decree, filed its cross-bill in the cause, against Dickinson, Rucker and wife, and Bryan, in which the main part of the decree is recited. In the cross-bill it is alleged by the Railroad Company, that it was formed by and organized under a contract made August 31, 1868, between commissioners of Virginia and West Virginia, with the Virginia Central Railroad Company, which

contract was ratified and confirmed by an act of the Legislature of West Virginia, entitled, "An act confirming and amending the charter of the Chesapeake and Ohio Railroad Company," passed January 26, 1876.— (Acts of 1870, p. 5.) ; that before the making of the final contract, to-wit: on the 24th of May, 1867, and 30th November, 1867, preliminary contracts had been made between the same parties, having the same general design, but subject to conditions which rendered them imperative; that upon the faith of these preliminary contracts; and in anticipation of the final contract of August 31, 1868, the Virginia Central Railroad Company went on, under one of the provisions of the charter of the Chesapeake and Ohio Railroad Company, to receive subscriptions to a preferred eight per cent. stock, payable in lands. The business of receiving the subscriptions, and of contracting for lands in payment therefor, was entrusted to a general agent, and to sub-agents selected and paid by him. One of these sub-agents, J. A. Alderson, on the 20th day of June, 1868, made with Rucker the contract referred to in the original bill; that the validity of this contract is contested for the reasons afterwards stated; that no part of the contract has at any time been specifically performed, and it claims that under the circumstances, it is entitled to occupy the position of one who resists a rescission of a contract. The cross-bill then proceeds to make allegations and averments about the same as contained in the Company's answer, in relation to the contract of the 20th June, 1868, and the proceedings of the valuers and surveyor, had, and made, thereunder, and the alleged deed, except that in some respects it is more specific, and concludes thus: "Complainant charges, and expects to prove, that the whole transaction connected with this contract, is one marked on all its features by fraudulent misrepresentations and deception, to the prejudice of complainant's rights, and complainant will, upon such proof, ask that the said contract may be wholly rescinded, and set aside,

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and that upon a full hearing of the whole matter, such other and further relief may be granted to complainant, as may consist with equity, &c."

To the cross-bill, Dickinson, Mrs. Rucker, Bryan, and Rucker filed their separate answers. Dickinson, in his answer, says he knows nothing of the fraud, misrepresentations or mistakes referred to in the cross-bill, which are alleged to have been used to procure the contract between the Railroad Company and Rucker, and he calls for proof, and he says he can neither confess nor deny the same.

Mrs. Rucker, in her answer, is brief, and says she admits the contract of 20th of the June, 1868, between the Company and her husband. She denies all fraud and collusion in the procurement of the contract, and insists that the Company should be held to a full compliance with its engagement.

Bryan, in his answer, also admits the contract, and avers that there is no ground for its rescission, and in other respects is about the same as that of Mrs. Rucker.

Rucker, in his answer, admits the contract entered into by him and the Company, through J. A. Alderson, its duly authorized agent, and avers that he has substantially complied with its terms. He says it is true the surveyor reports that he has found, "by calculation," that the "Bend of Gauley" contains one thousand eight hundred and sixty-six acres; but, as he was informed, the calculation was not a mere speculative one as plaintiff assumes, but a calculation based upon an actual survey, made by the surveyor, and one which, if incorrect, falls short of the quantity the farm contains; that he is informed and charges that, since the sale actual and survey has been made of the "Bend of Gauley," farm by an engineer of the Company, employed for the purpose by the Company, and that his report shows no deficiency, whatever; that the contract does not stipulate that the surveyor should

give notice of the time at which he would make the survey, and that it was not incumbent on him, or any other person, to do so; that the surveyor was the mutual agent of the Company and him for the performance of the work, and acted as such; that he, Rucker, was not present, or notified to be present, at the survey; that the contract contains no provision for notice of the time and place of the assessment of Messrs. Brown, Grose and Copenhaver; that they were the mutual agents of both parties, and made the valuation at a time when he was not present pursuant to a joint note addressed them by Alderson and himself, informing them of their selection, and requesting them to go upon the land and value it pursuant to the contract, a copy of which was furnished them for the purpose. He denies all collusion with the valuers, and alleges that the land is worth quite as much as they put it at, and that other lands adjoining, of no better quality, are held at a much higher figure in cash; that so far as the state assessment is concerned, it is notorious that this is invariably below the value of the lands assessed; that as to the incumbrance on the land, plaintiff was fully informed before entering into the contract, which provides for its payment; that he has paid this off with the exception of about \$160.50, with two years' interest thereon, and that but for the bad faith of plaintiff in repudiating a fair and *bona fide* engagement, he would have long since been able to discharge the whole. He admits that has but an undivided interest in twenty-five acres of this farm, a fact which was overlooked at the time, and agrees to a proper abatement for this insignificant defect. He denies that there is an outstanding dower right on two other tracts, but admits that the tracts bought of D. R. Hamilton, containing five hundred and sixteen acres, are subject to a contingent right of dower by Hamilton's wife dependent upon her surviving him; that this contingency may never happen, and may be provided for by allowing the Company to retain stock sufficient to cover it until the question is deter-

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mined; that this land is unimproved and of much less value than the residue of the tract. He denies all fraud in the description of the "Bend of Gauley" farm, and avers that its condition at the date of the contract was as represented therein, substantially; moreover, the agent of the Company, when entering into the contract, was thoroughly conversant with its condition, and the representations were no inducement thereto. He claims that there is no outstanding dower right upon the two hundred and fifty acres in Nicholas, and believes it well worth the price agreed to be paid therefor. He also says that it is doubtless true, that the one hundred and seventy-five acre tract in Clay county has been sold for taxes, but whether the taxes accrued before or after the purchase by complainant, he does not know; that it was not sold until after plaintiff's purchase, and no deed was made to the purchaser at the tax sale for about two years after complainant was given possession. He claims that this loss must fall on plaintiff; but if otherwise, it is ground only for compensation or abatement, and not for a rescission of the entire contract. He believes this tract to be fully worth the price to be paid, and the agent of the Company was far more familiar with its value than he. He claims that the deed from him and wife to plaintiff was never delivered to the Company or accepted by it; but says it is true that the deed was in the first instance delivered to take effect when the Company should comply with its part of the contract; and afterwards, on the 9th day of November, 1868, at the solicitation of the general agent of the Company for land subscriptions, and of John A. Hamilton, and of its sub-agents, at a time when the Company was desirous of perfecting all contracts for land subscriptions in order to complete its organization, and secure the privileges extended by the legislatures of the two Virginias, he made an absolute, final and unqualified delivery of the deed to Hamilton, who was duly authorized to receive the same; who thereupon, on behalf of the Company, had it recorded in the

counties of Nicholas and Clay. He also says the contract was ratified and the deed accepted by the Company, and the stock agreed to be furnished under the contract has ever since been represented in the general meeting of the stockholders of the Company. He denies all collusion, fraud and misrepresentation, and all the allegations of the cross-bill not admitted, and avers that he has complied with his engagements substantially, and that the Company should be held to a full performance of its engagements, in the premises.

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On the 26th of April, 1872, the causes were heard together, the original cause upon the papers formerly read, and the cross-bill cause upon the bill, answers of the defendants thereto, replications to the answers, exhibits, depositions, &c: And the court decreed that the application for a rescission of the contract, upon the ground of fraud, be rejected and disallowed, and the prayer of the cross-bill, as to that ground, be dismissed. The court in its decree further provided, "And it appearing to the court that these lands were sold by the acre, and not by the tract, which renders it material that before final decree is rendered the quantity thereof, should be accurately ascertained, by a competent surveyor, the one party contending that the several tracts of land in the "Bend of Gauley" constitute a tract of 1,866 acres, and the other party that said tracts contain only 1,379½ acres or 1,293½ acres, the court is therefore of opinion that until an accurate survey is made the smallest quantity may be safely adopted by the court, not, however, to the prejudice of either party, when the quantity is accurately ascertained; and it appearing that when the 250 acres are added to the above quantity of 1,293½ acres they make an aggregate quantity of 1,543½ acres, and the said 1,293½ acres having been sold at the price of \$16.50 cents per acre, and the tract of 250 acres at \$3.00 per acre they make an aggregate sum of \$22,093, for which the defendant Rucker, his assignee or creditors, are en-

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titled to have issued stocks by the Railroad Company, to pay at least eight per cent, so soon as the road of the said Company is finished to the Ohio River; which stock, so far as necessary, is liable to the lien of the judgment of the plaintiff, Dickinson, after first applying so much as may be necessary to pay off the lien of \$169.-50 with its interest, due to Andrew F. Foster, balance on the 150 acres of land conveyed by him to the defendant Rucker: It is, therefore, adjudged, ordered and decreed that the said Chesapeake and Ohio Railroad Company do forthwith issue the sum of \$22.093, guaranteed to pay eight per cent. thereon, so soon as the said road is in running order through to the Ohio River, to the said Wm. P. Rucker, and place the same in the hands of Samuel Price, commissioner appointed by this court to receive the same, with directions to sell, or have sold, for cash, so much thereof, in the Richmond market, as will pay the debt due the plaintiff, Dickinson, amounting to \$2,879.66, with interest from the 26th of April, 1872, until paid, and the cost of suit, and the debt of Foster, as aforesaid, &c." The commissioner was directed to hold the residue of the stock in hand, subject to the orders and decrees of the court. The court in this decree appointed a special surveyor to ascertain, by actual survey, the quantity of acres in the "Bend of Gauley" tracts and report the same to the court. The court also appointed a special commissioner to ascertain, *first*, whether the 3000 rails mentioned in the contract have been made and put up in fence, if not, the extent of the failure, and the amount which can properly be charged therefor; *Second*, whether the taxes were all paid by the said Rucker, upon the tract of 175 acres of land properly chargeable to him to the date of the sale, and if not, the amount which he omitted to pay, and the effect of the failure upon the title of said land now in the hands of the Railroad Company. Upon the rendition of this decree the Railroad Company appealed, and it is now for this Court to determine what errors, if any, were

committed by the circuit court, and what should be done in the causes.

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*First.* It is insisted by the appellant, that exhibit No. one, filed with the original bill, is not legal or proper evidence of the alleged judgment, as against it; and the judgment and debt in the original and amended bills mentioned, being controverted by its answer, that it was error in the circuit court, in the absence of other sufficient proof of the alleged judgment, to decree against it the execution of the contract.

It is true there is no evidence or proof of the alleged judgment or debt against Rucker taken or filed in the cause except exhibit No. one, which I have given in full. Rucker in his answers does not deny the existence of the debt and judgment, as alleged in the original and amended bills, and they are taken for confessed, as to Mrs. Rucker and Bryan. Although it is provided by chapter one hundred and twenty-five, section thirty-six of the Code of this State, that "every material allegation of the bill, not controverted by answer, shall, for the purposes of the suit, be taken as true, and no proof thereof shall be required," the allegations in Dickinson's bills, as to his debt, and judgment, must be taken as true, against Rucker, and the other defendants, who failed to controvert them; still, as the appellant, in its answer, does controvert the existence of the debt and judgment, the allegations in relation thereto cannot be taken as true against it, but must, in this case, be established by competent and proper evidence, especially as Dickinson's right to a decree in the cause against the appellant, under and by virtue of the contract, or for any cause, alleged in the bill, is controverted in the appellant's answer.

Green., on Ev., vol. 1, page 638, sec. 501 says: "As to proof of records, this is done either by the production of the records, without more, or by a copy. Copies of records are, (1) exemplifications; (2) copies made by an authorized officer; (3) sworn copies. Exemplifications,

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are either *first*, under the great seal ; or *second*, under the seal of the particular court where the record remains. When a record is the gist of the issue, if it is not in the same court, it should be proved by an exemplification. \* \* But, in the United States, the great seal being usually, if not always, kept by the Secretary of State, a different course prevails; an exemplified copy, under the seal of the court, is usually admitted, even upon an issue of *nul tiel record*, as sufficient evidence. When the record is not the *gist* of the issue, the last mentioned kind of exemplification is always sufficient proof of the record at common law." By the Code of this State chapter one hundred and thirty, section five, it is provided that "a copy of any record or paper in the clerk's office of any court, or in the Recorder's office of any county, or in the office of the Secretary of the State, Treasurer, or Auditor, or in the office of Surveyor of Lands of any county, attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original. Any such copy or certificate purporting to be sealed, or signed and sealed, or signed alone, by any such officer, may be admitted as evidence without any proof of the seal or signature, or of the official character of the person whose name is signed to it." This section, as is manifest from other sections of the same chapter, so far as it applies to records of courts, is applicable only to the records of courts within the State, and not to courts which are foreign. Exhibit No. one, is not under the seal of the District Court of the United States. Is it a copy of a judgment of that Court? Does it purport on its face to be a copy? If it is not a copy, and does not purport to be a copy, even though the attestation of the clerk of the District Court of the United States for the District of West Virginia were sufficient, without the seal of the court, it cannot be read as evidence or as proof of the judgment, as against the Railroad Company, under the section of the Code, above cited. A copy, is a true transcript of an original writing. 1 vol.

Bouvier's Law Dict. 363. An exemplification is a perfect copy of a record or office book, so far as relates to the matter in question. *Id.*, 362. Exhibit No. 1, is not in the form of judgments, as usually entered by courts of record—it does not purport to be a copy of a judgment, but only “a true abstract from the record,” and is certified as as an abstract by the clerk, and not as a copy of the judgment. An abstract of a judgment or title is not the same as a copy of a judgment or title. An “abstract of a title” is a brief account of all the deeds upon which the title rests. A synopsis of the distinctive portions of the various instruments which constitute the muniments of title. See Preston on Abstracts of Title; Wharton's Dict., 2d Lond. Ed.; Bouvier's Law Dict. 47. An abstract, ordinarily, means a mere brief and not a copy of that from which it is taken. This paper, then, being only an abstract of an alleged judgment, and attested only as an abstract, and not as a copy, and the existence of the judgment being denied, and the abstract, excepted to as not being legal evidence of the judgment, it cannot be read as proof of the judgment against the Railroad Company. It would be extremely dangerous to accept mere abstracts of judgments as proof of the original. I don't think it necessary that a complete copy of the whole record of the case in the District Court should be produced, but only a properly authenticated copy of the judgment. *White v. Clay*, 7 Leigh, 68, 78, 82; *Greene v. Harmon*, 5 Gratt., 157.

In the cases last cited it was *held*, that extracts from the record might be read as evidence in those cases, but the extracts were copies, of several separate orders and decrees, and not mere abstracts thereof; or, in other words, not the opinion of the clerk as to the substance or effect of the orders or decrees. If exhibit No. 1 was a copy of the judgment as entered, it would be an extract from the record of the cause, and not a complete copy of the whole record, and, being an extract from the

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record, and a copy of the judgment, as entered therein, it would be evidence in this case under the ruling in the cases to which I have referred. I understand the court to have simply decided, in these cases, that it was not necessary to produce a complete copy of the whole record, but only to produce a copy or copies of so much of the record, as satisfactorily established the fact in question. Judge Tucker, in the case of *White v. Clay*, 7 Leigh, 82, says, "For, where the fact to be shown is merely that a decree has been made in the court of chancery, or that a decree made there has been reversed on appeal, proof of the other proceedings will not be necessary, but the adversary party will be at liberty to show any other matter in the record, which may avoid the effect of that which is introduced." The third and fourth sections of chapter one hundred and thirty-nine of the Code, provides for docketing judgments upon delivery to the Recorder, of authenticated abstracts thereof. The docketing of judgments, as provided for, is intended for a special purpose, and that is to enable persons who may desire to purchase lands, &c., in any county, to know at what place, and in what description of record book they can learn the fact as to whether there are judgment liens; or, in other words, it is intended as notice to purchasers, that they may be put upon intelligent inquiry. An authenticated copy, from the Recorder's docket, would be evidence as to where the abstract was docketed, and of notice to third persons of the existence of the judgment, when such judgment was properly proved; but would not, I apprehend, in a suit where the existence of the judgment was put in issue by the pleadings, be received, ordinarily, as proof of the judgment, and dispense with the necessity of producing an authenticated copy of the judgment itself. When the judgment, or an authenticated copy thereof, is produced, then an authenticated copy from the Recorder's docket is simply proof that an abstract of the judgment was docketed as, and at, the place, prescribed by law, to have its

legal effect touching the preservation of the judgment lien as against subsequent purchasers, &c. It has been argued, that if exhibit No. 1 purported to be a copy on its face, and was in fact a copy, and so attested by the clerk of the District Court of the United States, for the District of West Virginia, it could not be read as evidence, upon the ground that section five of chapter one hundred and thirty, already cited, does not embrace or apply, to records of the district or circuit courts of the United States, held in this State, but only to the records, &c., of the courts within this State, established by the Constitution and laws thereof—it not being authenticated according to the Act of Congress, or the nineteenth section of chapter one hundred and thirty of the Code of this State, and not having the seal of the court attached thereto.

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The District Court of the United States, and also the Circuit Court thereof, held within this State, are in many respects domestic courts. These courts administer the laws of the United States in the several states; but they administer also the laws of each state, and follow, to a very great extent, the systems of judicature of each, in their respective districts; pursuing, in most cases, their practice, and deferring to their decisions; binding lands by their judgments, and issuing process to every part of their jurisdiction, without pretention, generally, of power to act upon the people or the territory, of another state. And in the execution of these duties, some are engaged in untangling the complicated system of land laws, altogether peculiar to one state; some look for the lights of legal science to the common law, while others draw their principles from the fountain of the Institutes, or the pages of the *Code Civile*. Opinion of Tucker, judge in *Draper's Exors. v. Gorman*, 8 Leigh.. 647. It is obvious, however, that the circuit or district courts of the United States, of Ohio or New York can not be considered as domestic courts in our State tribunals. Judge Tucker, in same case, on same page, says: "Admitting that the

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Dickinson and should be so treated, there are reasons for it which,  
V. if not altogether satisfactory, are entitled to much con-  
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controversies between man and man ; it follows *Virginia*  
practice, it defers to *Virginia* decisions, it decides facts  
by a *Virginia* jury ; its judgments bind *Virginia* lands,  
its process pervades the state and its executions attach  
both the property and persons of our people. These are  
strong considerations ; but the *commune vinculum* is  
wanting, the sovereigns are different, and the jurisdic-  
tions, upon principle, ought to be regarded as alien to  
each other. The nineteenth section of chapter one hun-  
dred and thirty of the Code does not apply to the records  
and judicial proceedings of United States Courts held  
within this State, but in other states, as is manifest, from  
the concluding clause, "shall have such faith and credit  
given them in every court within this State, as they have  
in the courts of the State, territory or district whence  
the said records came." If the fifth section of chapter  
one hundred thirty of the Code does not apply to the  
records and judicial proceedings of the district, and cir-  
cuit courts of the United States, held within this State,  
then our State Legislature has failed to provide, by stat-  
ute, any mode of authentication of the records and  
judicial proceedings of these courts to entitle them to be  
received and read as evidence in our State courts. If  
judge Tucker in the use of the word "alien," in speak-  
ing of the United States Courts, held in this State, and  
our State Courts, meant to assert that they were "foreign"  
in their jurisdiction, in all respects, I think he asserted  
more than is recognized by the judiciary and legal pro-  
fession of this day. It is unquestionably true that courts  
of the United States, though held within this State, de-  
rive their existence and jurisdiction from the Constitu-  
tion and laws of the United States, and not from the  
Constitution and laws of the State ; still, in the exercise  
of their jurisdiction they administer the laws of the

State, their juries are citizens of the State, the offices of their clerks are within the State, and, so far as I am informed, the officers of the courts are citizens of the State. The judge of the district court is generally, if not always, a citizen of the State, and he is one of the judges who presides in the circuit court, and may alone, as he often does, hold that court. The judgments, or decrees of these courts, held within the State, have never, so far as I am advised, been treated and held by our State courts as foreign judgments. Our State courts recognize and enforce the liens of the judgments of these courts, when asked to do so. The judgments of foreign courts do not constitute liens upon lands within this State. A judgment rendered by a court in the state of Ohio is not a lien upon lands in this State. The jurisdiction of the circuit and district courts of the United States, held within this State, as a general rule, is local, does not extend beyond the limits of the State. There may be some exceptions to this rule, but if there are any, they are very few. In many cases, they exercise jurisdiction over the same subjects as our State courts, in actions real and personal, as well as in some cases of crime. So far as these courts derive their existence and jurisdiction from the Constitution and laws of the United States, they may be considered foreign, in a limited sense; but in the exercise of their jurisdiction in the administration of justice, they may be properly considered as domestic courts, according to my present convictions. Greenleaf in his first volume upon Evidence section four hundred and ninety, says: "The reciprocal relations between the national government and the several states are not foreign, but domestic. Hence the courts of the United States take judicial notice of all the public laws of the respective states, whenever they are called upon to consider and apply them. And, in like manner, the courts of the several states take judicial notice of all public acts of Congress." In the four hundred and eighty-ninth section of same

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volume he says : "The relations of the United States to each other, in regard to all matters not surrendered to the general government by the national constitution, are those of foreign states in close friendship, each being sovereign and independent. Upon strict principles of evidence, therefore, the laws and public documents of one state can be proved in the courts of another, only as other foreign laws." There has been some relaxation of this rule, by the courts of many of the states, and the Supreme Court of the United States, as will be seen by same section. In section five hundred and four of same volume he says ; "In regard to the several states composing the United States, it has already been seen, that though they are sovereign and independent, in all things not surrendered to the national government by the Constitution, and therefore, on general principles, are liable to be treated, by each other, in all other respects, as foreign states, yet their mutual relations are rather those of domestic independence, than of foreign alienation." (7 Cranch 481; 3 Wheat., 234.) "It is accordingly provided, in the Constitution of the United States that full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state, and that Congress may, by general laws, prescribed the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Under this provision Congress passed, upon this subject, the act of May 26, 1790, which is familiar to the legal profession. The fifth section of chapter one hundred and thirty-nine of the Code of this State provides that "every judgment for money, rendered in this State, heretofore or hereafter, against any person, shall be a lien on all the real estate of, or to, which such person shall be possessed or entitled, at, or after, the date of such judgment, or if it was rendered in court, at, or after, the commencement of the term at which it was so rendered, &c." And the eighth section of the same chapter provides that "the lien of a judgment may always be enforced in a court

of equity." Do not these sections apply as well to judgments of the United States Courts held within this State, as to judgments of our State courts? I apprehend they do, and I think there is no difference of opinion upon this subject among members of the legal profession. And so of the fourth section of the same chapter, in relation to the docketing of judgments and the preservation of judgment liens. If these sections apply to judgments of the circuit and district courts of the United States, why may not the fifth section of chapter one hundred and thirty apply to the records and judicial proceedings of these courts? The language is equally broad—It is "a copy of any record or paper in the clerk's office of any court, may be admitted as evidence in lieu of the original, &c." My present conviction is that said fifth section does embrace the records and judicial proceedings of these courts. And that to entitle them to be received as evidence in our State courts it is only necessary that they should be authenticated in the same manner as said section requires the records and judicial proceedings of our own courts to be certified to entitle them to be received as evidence. Such, according to my understanding, has, heretofore, been the universal practice of our State courts, and that practice so far as I have learned has been sanctioned by the legal profession of the State. This objection of appellants must therefore be overruled.

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*Second,* It is objected by the appellant that the decree of April 26th, 1872, is erroneous in directing the Railroad Company to issue \$22,093 of its stock, guaranteed to pay eight per cent thereon, so soon as its railroad is in running order through to the Ohio River.

The contract specifies that the price of the land shall be paid in eight per cent preferred stock of the Chesapeake and Ohio Railroad Company, at its par value, and the Company is not thereby required to guarantee the payment of eight per cent thereon. This objection is well taken and must be sustained.

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*Third.* It is objected that Andrew F. Foster should have been made a party to the original and amended bills, before the decree of the 27th of April 1872 was made, as there was, and is still, purchase money due him from Rucker, which is a lien upon 150 acres of the "Bend of Gauley" farm.

In the decree the court undertakes to ascertain the amount of purchase money due Foster and to provide for its payment out of the sale of the stock, and the amount, so ascertained, is less than the amount of purchase money stated to be in arrear in the contract. How the court ascertained that there was \$169.50 due Foster, with its interest, from the evidence in the cause, I am unable to understand. Rucker says in his answer that he has paid off the purchase money incumbrance, mentioned in the contract, except \$160.50, with two years interest thereon, but there is no evidence of this in the cause. The statement in the answer, under the circumstances, is not evidence or proof of the fact, and the answer does not even state to whom the amount is due. The party to whom the purchase money is in arrear, not being before the court, he is not bound by the decree. The amount of purchase money in arrear is controverted by the pleadings, and as it is clear that the appellant might be prejudiced and injured by the decree, in this respect this objection is well taken and must be sustained.

*Fourth.* It is further objected by the appellant that the contract was procured by fraudulent misrepresentation, and that the court erred in enforcing the valuation or award of Brown, Grose and Copenhagen, fixing the value per acre, of the "Bend of Gauley" farm, upon the ground of the fraud, and that the Company, or its agent, did not have notice of the time or place on, or at, which the valuers would proceed to ascertain the value per acre of this large tract, and was not present or represented at the valuation, though Rucker was, so far, at least, as to write the certificate or award of valuation. And also

upon the ground of false and fraudulent misrepresentation to the valuers of the character and boundaries of the land, and the title thereto, as made by Rucker in the contract, upon which representations they were influenced and acted, to a great extent, in fixing the valuation. And also upon the grounds of fraud, mistake and other misconduct in the valuers or arbitrators, and of fraud and imposition of Rucker upon the valuers or arbitrators; that the valuers, in fixing the value at \$16.50 per acre did not agree upon that sum as the money value of the land, but as the value per acre in depreciated stock.

The contract recites, "That the said Wm. P. Rucker has this day sold to the said Chesapeake and Ohio Railroad Company the following tracts of land lying in the counties of Nicholas and Clay, and State of West Virginia, viz: One tract lying in the "Bend of Gauley," in Nicholas county and State of West Virginia, containing two thousand acres, more or less, the exact number of acres to be ascertained by the county surveyor, at the earliest day practicable, and certified by him on the back of this agreement; the title and description of which tract of land are as hereinafter stated, at so much per acre as may be determined by Messrs. George Brown, Samuel J. Grose and Joseph Copenhaver, being disinterested and responsible land owners, in the said county, the price per acre to be certified by them on the back of this agreement, to be paid for in the eight per cent preferred stock of the said Chesapeake and Ohio Railroad Company, at its par value. The certificates of stock to be issued in three months next ensuing. The title to the land clear, and in no way encumbered, except there are some \$300 due, back money, on the "Bend of Gauley" plantation." These are the provisions of the contract, and it is under seal. It is not pretended that the Company, or its agent, had any previous notice, or knowledge, of the time or place the valuers would proceed to make the valuation or award of valuation; nor does it appear that the Company or its agent was informed or

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had previous knowledge or notice, that the valuers had or would accept the trust, and make the valuation, or that the Company or its agent, was present or had any knowledge of the valuation being made until long after the date of the certificate or award of valuation. It is clear, to my mind, from the provisions of the contract, that it was contemplated, by the parties, that the price or value of the land, to be determined by the valuers, was the money price or value of the land, and none other; else why provide in the contract that when the price or value was ascertained it should be paid in the eight per cent. preferred stock of the Company at their par value. If the value of the land is appreciated because to be paid for in supposed depreciated railroad stock, then the sale is not for the value, in money, to be paid in railroad stock at its par value, but for the value in depreciated stock. In other words, in that case, dollars in money are not the standard of the valuation, but dollars in the depreciated stock. The deposition of each of the valuers has been taken, and from their depositions it is clear that they did not pretend or intend to ascertain or fix the value of the land in money, and that the \$16.50, stated in their certificate or award as the value per acre of the land, is not their judgment or determination of the money value per acre, and was not so intended, but their determination of the value in dollars in supposed depreciated railroad stock, depreciating the stock, in fact, at from one to two-thirds. Joseph Copenhaver, in his deposition, says that he did not examine the land with a view to form a valuation, and that he cannot say that he had such sufficient knowledge of the land as to enable him to value it correctly; that they valued the land in reference to the money a good ways off, and a long time, and a good deal of trouble to get it; that he, or they, put the price higher, because the pay was slow and a good ways off; that he could not value the land at more than \$5 per acre in cash, and at about \$6 per acre in money, to be paid at six, twelve and eighteen months;

that in valuing the lands at \$16.50 per acre, he regarded it as very uncertain about Rucker getting his pay ; that he might never get it ; that the land was to be paid for in stock which he regarded as worthless—hence he valued the land so high ; that he is forty years old, and has lived about thirty-five years in the immediate vicinity of the land ; that he cannot say how often he had been on the land, but had been over it many times; had traveled over more of the land the winter prior to the taking of his deposition than he had before; that he had heard the land included the river cliffs all around from the Copenhagen branch to the lower end of the Nutter place, and some half of the river bed; did not know for certain that it included the river bed. His deposition was taken the 25th of March, 1872. Grose, in his deposition, when asked, "Did you examine said farm in reference to the various provisions of said contract, so as to fix a fair value upon said lands in money?" answered, "I read the contract; did not go over the land, but had a general knowledge of the land sufficient, as I thought, to fix the valuation of it." He says that in fixing the valuation, as well as he recollects, they took into consideration the probable value of the Railroad stock; from the best information they had they valued the land in reference to the stock, as well as money; that he had some knowledge of railroad stock; gathered it from railroad meetings, from speeches by Shannahan, Paxton and Walker: perhaps he had information from other sources; that he valued the land in reference to money and railroad stock; that if the "Bend of Gauley" was his he would not take less than \$10 per acre for it; he paid for his lands, which adjoin, from \$13 to \$15 per acre; there is not as much rough land on his, but some conveniences on the "Bend of Gauley" farm which are not on his; bought his land in a lump and not by the acre; he is not positive that in estimating the "Bend of Gauley" farm they took into the estimate the cliffs and bed of Gauley, but thinks they did; he does

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not know how many acres were embraced in the cliffs and bed of Gauley; never was along when a survey was made; that he does not regard the whole tract, as worth in money or its equivalent, \$16,50 per acre; he does not recollect what value he placed upon the eight per cent. preferred stock of the Chesapeake and Ohio Railroad Company at the time they valued the land; that they considered the stock as worth something, but did not think it worth dollar for dollar; don't recollect what they put it at; they were influenced, some, by the fact that the land was to be paid for in the stock of the Railroad Company, and would not have put the land as high, if paid for in cash; that he could not say that the description of the land as contained in the contract was correct; he did not survey the land or count the trees; he supposed it was correct; he did not examine how much was in clover and timothy, but knew a good deal was in; that Rucker was constantly sowing grass seeds; and they did value the land on the supposition that the description of the land in the contract was correct; the certificate as to the valuation looks like the handwriting of Rucker; that he is nearly forty years old, and has been more or less acquainted with the land since he was a little boy; clover and other grasses freeze out of the ground in a few years in that region of country; he regards the Gauley farm as worth at least \$10 per acre in cash, perhaps more. George Brown, in his deposition, says that, in valuing the land, they had both money and railroad stock in view; that he regarded the Gauley farm as worth about ten or eleven dollars per acre in cash, according to the way lands around it are valued; in valuing the land, the river cliffs and the river bed were spoken of; the contract was read in his presence, and he thought the description correct; he did not go upon the farm and examine it carefully before they valued it; he was over the farm a good deal before that time; was acquainted with the land nearly all his life, and is now forty-six years old. Rucker admits

before the commissioner that he wrote the certificate of valuation. The Company examined eight other witnesses, as to the money value, per acre, of this land, and some of them fixed the value at over \$5 per acre, and most of them under that amount. Some of these witnesses sold parts of the land to Rucker. Rucker also examined several witnesses on the same subject. The contract containing the description of the land was written by Rucker, and it appears from the evidence of Grose, one of the valuers, that the valuers, in making such valuation as they did, made it on the supposition that the description of the land, as contained in the contract, was correct. They did not acquire such knowledge by examination of the tract and its boundaries, with reference to its value per acre, as would enable them to approximate a correct judgment upon the subject. They seem to have received and took the description of the land, title and improvements, &c., as stated in the contract, as being correct, without having satisfied themselves of its correctness by examination or view of any description after the date of the contract, or examination of the lands and improvements, &c., thereon, with reference to ascertaining or fixing the value per acre, prior to the date of the contract. I think it is manifest that they took it for granted, in making up their award, that the description of the land, improvements thereon and the title thereto, as contained in the contract, was true, as in the contract stated, and that they, in determining the value, did take that description as true, and that it influenced them in making their award. And this, too, in the absence of the Company, or its agent, and without any effort to obtain other information on the subject. It follows that if they fixed, or were influenced in fixing, the valuation upon the hypothesis that the written description in the contract was correct, and the "description" itself is materially false or untrue, that the valuation is also necessarily false and incorrect. I think it clear from the evidence that the description of the land, im-

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provements, &c., contained in the contract, did influence the valuers in fixing the value of the land in their award. After a careful examination of the description of the land, the title thereto and the improvements thereon, &c., as contained in the contract, the descriptions and exhibits filed in the cause, and the whole case, it seems to me that some of the material representations made by Rucker to the Company and its agent, in the description of the "Bend of Gauley farm," the title, improvements thereon, &c., as contained in the contract, which was written by Rucker, are misrepresentations, and were not true at the date of the contract, and that they were materially false and untrue at the date of the said contract, and that such misrepresentations, so made, were each, under such circumstances, as in law, to constitute a positive fraud in Rucker as against the Railroad Company; that such material misrepresentations of the land, the title thereto, and the improvements, &c. thereon, did materially influence and induce the Company and its agent to make the contract of purchase of the "Bend of Gauley farm," and did influence the valuers appointed to value the land, in fixing the value thereof, in their award; the misrepresentations, as made, not only affect the contract with fraud, but also, under the circumstances, enters into and taint the award of valuation with the fraud. In construing this contract, the description of the land, title, &c., being contained in it, as made by Rucker to the Company and its agent, must be considered as a part of the contract, and of the consideration which induced the Company and its agent to make it. The contract, as written by Rucker, in contemplation of law for him, undertakes that the title and description of the land are as in the contract described. The description was inserted by him for some purpose, and Alderson, the agent, in his deposition says, that at the time he signed the contract he did not know, that the representations contained in the contract, and the description as given of each tract were true; that he signed the contract on the represen-

tation of Rucker, who prepared it ; that some of the facts he knew to be true in relation to the "Bend of Gauley" tract ; he knew there were two very comfortable log houses on the farm, and also a new building erected, but not completed ; he knew that a considerable quantity of land was cleared ; did not know the amount of acres cleared, and knew a number of fruit trees to be on the farm ; did not know the number of fruit trees ; he knew that there was a good deal of valuable timber on the land ; he knew that there was a good deal of fencing and some portion in grass. He further says, in a previous part of his deposition, that he did not, before signing the contract, as agent of the Company, go upon all the land, mentioned in the contract, and carefully examine the same ; that he had been over a portion of the "Bend of Gauley" tract, called the Nathaniel Foster tract, but he did not know the character, quality, quantity and condition of each and all the tracts so sufficiently as would enable him to fix a fair cash value upon each tract, and therefore Rucker and he entered into the written agreement dated the 20th of June, 1868, leaving the valuation of the whole of the "Bend of Gauley" tract to Samuel J. Grose, George Brown and Joseph Copenhaver, who lived in the immediate neighborhood of the land, whom he regarded as honorable men, and being well acquainted with the tract he thought them better judges of the value of the land than he. The substance of the evidence of Alderson, the agent, upon this point is, that he did not know the character, quality, quantity, and condition of each and all of the tracts composing the "Bend of Gauley" tract ; that he had been over one of the tracts ; that he signed the contract on the faith of the representations of Rucker. The evidence of Alderson is not impeached in any wise. Rucker, it appears, was at and before the date of the contract well acquainted with the "Bend of Gauley" land.

It does not distinctly appear whether Rucker was present with the valuers during their consultation, but I

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infer that he was with them or some of them, and knew their determination before the certificate or award was signed, from the fact that he wrote it. He must have produced or furnished the contract to the valuers as the certificate or award purports to be written on the back thereof, and one of the valuers says he read it, and another that he heard it read. It is not common for one of the parties to a reference to write the award of the arbitrators. It does not distinctly appear whether Rucker wrote the certificate, or award, at his own instance, or at the request of the valuers, but, it fully appears that he prepared it, and certainly wrote it, strongly in his own interest. The award is couched in such language as makes the arbitrators certify *prima facie* to two material points or facts therein erroneously stated to-wit :

*First*, that they had carefully examined Dr. Wm. P. Rucker's "Bend of Gauley" plantation, in accordance with the provisions of the agreement referring the matter to them, when from their evidence they had made no examination of the plantation after the contract ; and,

*Second*, that the tract of land is worth \$16.50 per acre, when, according to their evidence, they did not determine the cash or money value of the land, but determined as I have before stated. It would be difficult to construe the certificate or award upon its face otherwise, than that the valuers had carefully examined the land after the matter had been referred to them, by the contract or agreement, and had determined the land to be worth \$16.50 per acre, in money. Whether the award was written in the language it is, by mere accident or for a fraudulent purpose, it was certainly deceptive upon its face and tended strongly to mislead and deceive the Company or its agent. Alderson seems to have known the arbitrators. and to have reposed confidence in them, and it was not unlikely that he might accept the award as true and fair for the Company, as its agent, without suspecting any wrong or fraud.

It does not appear, by evidence other than the valuers

what was the money value of the 8 per cent preferred stock of the Company; whether it was below or above par; nor does it appear by the evidence of the valuers that they had any accurate or sufficient knowledge of the fact or evidence before them to establish the fact. They acted upon the hypothesis that it was not worth in money its par value, but how much they considered its money value, below par, they do not state, but we are left to infer from their statements as to the cash value of the land.

The certificate of valuation can not be considered as more solemn, more conclusive, or binding upon the parties, than an ordinary award. It is but an award, and the referees cannot, upon principle, be considered otherwise than as arbitrators. Chancellor Kent, in his very lucid and able opinion in the case of *Underhill v. Van Cortlandt*, 2 Johns., Ch. (N. Y.) 339, holds and treats such a reference as a submission to arbitration, and the determination or decision as an award. In further considering this subject I shall treat and consider the valuers as arbitrators and their certificate as an award. "The decision by arbitration is the decision of a tribunal of the party's own choice and election. It is a popular, cheap, convenient and domestic mode of trial, which the courts have always regarded with liberal indulgence; they have never exacted from these unlettered tribunals, this *rusticum forum*, the observance of technical rule and formality. They have only looked to see if the proceedings were honestly and fairly conducted, and if that appeared to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators." See opinion of chancellor Kent in same case. While this is true, courts, especially courts of equity, it is well settled, will in proper cases look into and examine the proceedings of arbitrators to a certain extent and if it is found in conformity with the established rules, that in any given case the arbitrators have been guilty of corruption or fraud, partiality, misconduct or gross or palpable mis-

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take, or excess of power, in making their award, the court will set it aside, and declare it null and void. See same opinion, and the numerous English and American decisions there cited. 1 Wash. 156, 193; 1 H. & M., 67; 2 H. & M., 408; 2 Munf., 8; 5 Munf., 10; 6 Rand., 529; 3 Rand, 2; Caldwell on Arbitration, 158, 159 and note 1. In the case of *Lee v. Patillo*, 4 Leigh. 436, an award was set aside on the ground of circumstances in the conduct of the arbitrators amounting to misbehaviour, though not to corruption, and resulting in injustice to one of the parties.

It is settled, by the authorities, that a court of equity will, and should, set aside and annul an award for fraud or imposition on the part of the party attempting to set up an award, by means of which the arbitrators were deceived. In such case, the result is not the deliberate and fair judgment of the judges chosen by the parties. It may be a true judgment, upon a case falsely imposed on them by the fraud or imposition of the party. See case of *The Boston Water Power Co., v. Gray*, 6 Metcalf, (Mass.) 131, and the case of *Underhill v. Van Cortlandt*, 2 Johns. Ch., (N. Y.) 339; Caldwell on Arbitration, 170, 171, 172, and cases there cited.

A party to an award cannot come to have it set aside upon the simple ground of an erroneous judgment,—there must be something more—such as above stated. Caldwell on Arbitration, 158, 159, and the numerous cases cited in note one, and the cases hereinbefore cited. In the case of *Jenkins v. Liston*, 13 Gratt., 535, it was held, that “arbitrators having received a paper, without the knowledge or consent of one of the parties to the arbitration, though they say that their opinions were formed before it was received, their award is void.”

There seems to be some difference of opinion as to whether a court of equity will, or ought to regard the proceeding by arbitrators, to consider a matter referred to them, and making an award thereon in the absence of a party, and without notice to such party of the time or

place of their acting, as being such misconduct in the arbitrators, or sufficient cause to authorize or require the court to set aside an award. This question has not been fully determined by the Supreme Court of Appeals of Virginia, or of this State, so far as I am aware. In the case of *Miller v. Kennedy*, 3 Rand., 2, which was an action at law, it was held, that "It is not universally true, that notice should be given of the time and place of making an award. But, if notice be necessary, the defendant cannot avail himself of the want of it, where the submission has been by the *mere act of the parties*, nor of *corruption or partiality* in the arbitrator, nor of any other extrinsic circumstance whatever, in an action on the award, or on a submission bond; but his only redress is in a court of equity. *Aliter* if the submission be by *order of court*." Judge Cabell, who delivered the opinion of the court, in that case, says: "It is highly probable that justice would require, in most cases, that such notice should be given. But there are many cases in which it would not be necessary. The case may be one not depending on evidence; or all the facts may have been agreed, and made known to the arbitrators." The only question before the court was, whether the want of notice to the defendant from the arbitrator, of the time and place for examining the matters submitted for the decision of the arbitrator, was a good defence against an award in an action at law founded thereon, and the court held that it was not; but further held, that in most cases justice would require that such notice should be given, and, that want of notice, even if that were a case requiring notice, could not be taken advantage of in that action, but that the proper remedy was, as in cases of *corruption or partiality* in the arbitrators, in a court of equity. In the case of *McCormick v. Blackford*, 4 Gratt., 133, it was held, that, "It is misbehavior, in arbitrators, to meet and make their award in the presence of one of the parties, and in the absence of the other, who wished to introduce other evidence before them, and without

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notice to him." Caldwell on Arbitration, 118, says: "It has been said, that it is not necessary that express notice should be given by the arbitrators when they intend to meet, the parties being bound to take notice; but this seems most unreasonable, and there is no doubt but that an award, made without due notice, given to the parties, would, at the present day, be set aside."—Kyd on Awards, 95, 96, 101. In the case of *Rigden v. Martin*, 6 Harris & Johnson, (Md.,) 403, upon a motion to set aside an award on the ground that notice of the time and place of meeting had not been given to the parties, the court said: "That the parties ought to have notice of the time of meeting, is a position so strongly supported by common justice, that it would seem not to require the aid of authorities. Every man ought to have an opportunity afforded him to be heard in defence of his rights; and it is with surprise, we find in one case, Lord Hardwicke is made to say, notice is not necessary. This opinion, however, is overruled by many authorities." See, also, *Falconer v. Montgomery*, 4 Dallas, (Penn.,) 232, in which the same principle is held. In the case of *Lutz v. Linthicum*, 8 Peters, (Sup. Ct. U. S.,) 178, Justice Story said, "Without question, due notice should be given to the parties, of the time and place of hearing the cause; and, if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside." In *Peters v. Newkirk*, 6 Cowen, (N. Y.,) 103, the court declared that the right to notice was implied in the agreement to submit. In the case of *Elmendorf v. Harris*, 23 Wendell, (N. Y.,) 628, it was held to be a fundamental rule of construction, in reference to every transaction in the nature of a judicial proceeding, that the contract of submission necessarily implies that the arbitrator is not authorized or empowered to decide the question in controversy, without giving the parties an opportunity to be heard in relation thereto; unless by the terms of the submission, the right of the party to be heard before the arbitrator is waived; and that therefore an award made

without notice, is void. See, also, *Crowell v. Davis*, 12 Metcalf, (Mass.,) 293; *Rivers v. Walker*, 1 Dallas, (Penn.,) 81. In the case of *Peters v. Newkirk*, 6 Cowen, (N. Y.,) 103, it was held, that where the only question submitted to arbitration was the appraisement or valuation of property, the parties have a right to notice.

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From the weight of authority upon the subject, and from such reflection as I have been able to exercise, my mind has been brought to the conclusion, that sound principles, justice, and a due regard for the proper administration thereof among men, by arbitration, require ordinarily, though, perhaps not, universally, in equity, that an award made by arbitrators in the absence of parties to the submission, who are materially interested, upon matters submitted for their determination, without previous notice to such parties, or their authorized agents or attorneys, of the time and place of meeting, may be set aside in equity, ordinarily, if objected to by a party to the submission, materially interested, not having such notice and being absent, *provided*, such party has not dispensed with or waived notice or the like.

It is argued, however, that the persons chosen in the case were the agents of the parties, and their acts under the submission are binding upon them without notice. I cannot regard them as simple agents of the parties. They were chosen, not as agents, but as men, indifferent between the parties, to judge and decide fairly, justly and impartially upon the matter submitted to them. Each party was entitled to be heard by and before the arbitrators upon every point involved in the case, or which might or did enter into their consideration before or at the time of their decision. How can parties obtain a hearing if, they claim one, before arbitrators, unless they are notified of the time and place when they may be heard by them? When a question is submitted to arbitration, the arbitrators selected are the court appointed by the parties for the purpose of determining the

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question between them; they constitute the court; but the time and place of their meeting to hear and determine the case is not fixed by law, and if they are not fixed in the submission, unless the arbitrators fix them, and the parties have notice thereof, they have no assurance whatever of being heard in any case, or that their cause, rights or interest will receive due or just examination and consideration or decision at the hands of the arbitrators. One party being more officious or favored than the other, might learn the time and place of meeting, while the other did not, and attend, and with *ex parte* evidence, or otherwise, gain an undue advantage with the arbitrators; while if the opposite party were present, it might, and would, most probably, be otherwise. The encouragement of arbitration among the people I think clearly demands adherence, generally, to the rule I have announced upon that subject, and justice certainly demands it.

The award in this case, is obnoxious to the following objections. *First.* The award was made in the absence of the appellant, its agent or attorney, and without notice to it, its agent or attorney of the time and place of the meeting of the arbitrators to consider and award upon the subject referred to them for determination. It not appearing that the appellant, its agent or attorney, dispensed with or waived notice or the like. *Second.* The description of the land, &c., contained in the contract, which was made by Rucker and is a part of the contract, was before the arbitrators, and the description being false and fraudulent in material particulars and the arbitrators in making their award in the absence of the Company, its agent or attorney, having acted upon the description as being true, and were evidently influenced thereby in making their award. The award must therefore be regarded as having been procured by fraud and imposition and for that reason is not valid or binding upon the Company. *Third.* Though the simple fact that Rucker

(one of the parties) wrote the award in the absence of the Company, its agent or attorney, may not, of itself, be sufficient to make it invalid, still, it may be considered unexplained, as affording just ground for suspicion, and criticism. But Rucker having written the award, and so wrote it, as that it is materially erroneous and deceptive in his favor, for the arbitrators to sign, and they did sign it as written, the award may be held invalid in a court of equity under the circumstances, appearing in this case. *Fourth.* When the value of property in money is referred to arbitrators and they fairly execute the submission, generally, the award can not be set aside or determined to be invalid, upon the ground that the valuation is exorbitant—To hear complaints of this description against awards would amount to allowing an appeal to court from the fair and honest judgment of the arbitrators upon the question referred and would defeat the obvious purpose of the submission; but where the arbitrators fail to determine the value in money, according to the submission, but in fact determine the value in something else, which, from the face of the award, appears to be the money value, but was clearly not so intended by the arbitrators, it is, and properly should be, otherwise. I don't regard it as material, under the circumstances, to determine whether the arbitrators were guilty of misconduct in making an award without knowing the boundaries of the land or without having examined the land after the question of value was submitted to them.

I think the court below properly disregarded the award of the surveyor as to the quantity of acres in the "Bend of Gauley" tract, for the reason that his determination of quantity was not derived from actual survey made from the title papers, but from calculations made from data not altogether obtained from the title papers, but in part at least from instructions given by Rucker, some of which the surveyor says he did not know to be correct and some were not correct. For instance the surveyor says that he included in his estimate one half of the bed

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of Gauley river, being about eight poles, for a distance of eight hundred and sixty poles, and this he did by the direction of Rucker, when he says the title papers as he thinks, do not include the half of Gauley river. The surveyor does not seem to have run more than one line and he commenced to run and ended that, not by title papers before him, but by and according to the directions of Rucker. And I think the court was right in disregarding the award of the surveyor in this case under the circumstances and for other reasons, such as the want of notice to the appellant or its agent, of the time and place of making the survey, &c., the appellant not being present by agent or otherwise, and not having dispensed with or waived notice.

The description of the two hundred and fifty acre tract on the waters of Buck's garden, &c., in the contract mentioned, is a misrepresentation in material particulars, as clearly appears from the evidence of surveyor Robinson, Cowan and others. The agent of the Company signed the contract relying upon the representations of Rucker as before stated.

There is no evidence filed in the cause tending to show whether the representations made of the one hundred and seventy-five acre tract in Clay county, were true or false.

Five hundred and sixteen acres of the the "Bend of Gauley" tract conveyed to Rucker by David R. Hamilton by the deed made the 6th of August, 1865, was at the date of the contract, and still is, encumbered with the contingent dower interest of Hamilton's wife. This encumbrance, from the evidence, was known to Rucker at the date of the contract. Still he represents, and in fact undertakes, in and by the contract, that the title to this tract is clear and in no way incumbered. Rucker admits in his answer that he has but an undivided interest in twenty-five acres of the "Bend of Gauley" tract but does not state the amount of the interest nor in what

part of the tract the twenty-five acres is located. I in-<sup>1874.</sup>fer that it is the twenty-five acres, one moiety of which <sup>January Term.</sup> he purchased from Jacob Copenhaver. There appears <sup>Dickinson</sup> in the record a paper purporting on its face to be a deed <sup>V.</sup> from Copenhaver and wife to Rucker for one half of <sup>Railroad Co.</sup> twenty-five acres. This, I suppose, is the undivided interest which he claims in the twenty-five acres. This paper, purporting to be a deed, is not a deed, it has no seal or scroll attached to it. *Pratt & Fox v. Clemens*, 4 W. Va., 443. The certificate of acknowledgement by the wife is not sufficient to bar her of dower.

The paper filed with the record purporting to be a deed from O. S. Jones and wife, dated 5th of October, 1865, for thirty acres of land, is not a deed, because not made under seal. These two deeds do not pass to Rucker the legal title, but only an equitable title. The legal title appears to be outstanding. The paper writing from Jeremiah Nutter to Rucker for one hundred and seventy-two acres of "Bend of Gauley" farm which was acknowledged the 3rd of May, 1869, and was admitted to record May 11th, 1869, does not seem, from the record before me, to have been acknowledged according to law, at least as to the wife. The certificate of acknowledgement to this deed is not sufficient to bar the wife of dower, as it is not substantially in conformity with the form prescribed by law. The tract of one hundred and seventy-five acres in Clay county, it appears, was sold by the Sheriff of that county, in the year 1869, for the taxes of 1868, charged on the same, against Rucker; and one James M. Welch, became the purchaser, at the sale, and the land not being redeemed within the time prescribed by law, the Recorder of Clay county made a deed to the purchaser for the land on the 6th of January, 1871. The taxes for the year 1868 were charged against Rucker, for this tract, and constituted a lien thereon, before, and at the date of the contract of sale, and of the alleged deed of Rucker and wife. Rucker contracted to make a deed of general warranty to the Company. It was



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Rucker's duty under the state and circumstances of the case, to pay the taxes on the land for the year 1868. In consequence of the tax not being paid, the land was sold therefor, and a deed was made to the purchaser for the purchase money in consequence of the sale and failure of Rucker to redeem, after the sale. Such sale, and failure to redeem, under the circumstances of this whole case, the contract, fraud, &c., hereinbefore ascertained touching the contract, &c., must be considered to have been by reason of the default of Rucker, and not by the default of the Company, which, so far as appears, had no actual knowledge or notice, that the taxes for said year were unpaid, or that the sale for taxes was made. Rucker knowing of the taxes and that they were charged against him, and that they were his to pay, or see to, the Company not having agreed to pay the same, should have paid them in proper time, and the Company should not be made to suffer by reason of his default, if the land should be lost.

It does not appear that the Company ever took actual possession of any part of either tract of land in the contract mentioned, or ever exercised any ownership or control over any or either of them. By the contract the "Bend of Gauley" farm was to remain in the possession of Rucker until the 1st of January, 1872. "Fraud avoids a contract, *ab initio*, both at law and in equity, whether the object be to deceive the public, or one party endeavor thereby to cheat the other. For the law will not sanction dishonest views and practices, by enabling an individual to acquire through the medium of his deception, any right or interest." "Fraud invalidates every transaction, as well at law as in equity." Chitty on Contracts, 8 Am. ed. 586, and note 1. Same author, 589 says: "But if a party, for a fraudulent purpose, states a fact which is untrue, and without knowing it to be true and he does not, at the time, believe it to be true, this is both a legal and a moral fraud. And when the representation, expressly or impliedly, forms part of the contract

between parties, it is not essential, in order to invalidate the contract, that there should have been moral fraud in making such representation." If, upon a sale, the vendor makes material representations of matters of fact, as of his own knowledge, and they are in fact untrue, and the vendee is deceived thereby, the sale will be voidable, although the vendor did not know whether they were true or not." Same author, 589, latter clause of note 1. "When the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is a positive fraud in the truest sense of the terms. There is an evil act with an evil intent; *dolum malum ad circumveniendum*. And the misrepresentation may be as well by deeds or acts as by words; by artifices to mislead as well as by positive assertions." 1 Story. Eq.; Juris. sec. 192." Whether the party, thus misrepresenting a material fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable, as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a material fact by mistake, it is equally conclusive; for it operates as a surprise and imposition upon the other party." 1 Story Eq. Juris., sec. 193. See *Crump v. United States Mining Company*, 7 Gratt., 352. From the evidence and law I feel compelled to regard the contract in this case as having been procured by Rucker from the agent of the Company, by actual or positive fraud, and to treat it accordingly.

It is maintained however, by the counsel of appellees that the Company by its authorized agent, John A. Hamilton accepted the deed from Rucker and wife, long after the contract, and award were made, and allowed, and permitted the stock contracted for in the contract, to be represented at the meetings of the stock holders without ob-

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jection, and that the Company by these acts recognized and ratified the contract and award, and waived all right to object to the enforcement of the same on account of fraud or misconduct in the arbitrators, &c. The award of the arbitrators is dated the 6th day of July, 1868 and the survey the 3rd day of August, 1868, and the deed from Rucker and wife was acknowledged by Mrs. Rucker on the 1st day of September, 1868, and by Rucker on the 18th day of the same month and year. For some cause this deed recites that it is in consideration of the sum of \$5 only. No other consideration is stated in the deed, and no lien is retained for any purpose, and no mention made of railroad stock. On the 18th day of September Rucker delivered the deed to John A. Hamilton, as an escrow, to deliver to the Company as his deed, upon condition that the Company first pay to Hamilton, as per contract between Rucker and the Company, dated 20th of June, 1868 as appears by the written endorsement on the deed, made and signed by Rucker, at the time he delivered the deed to Hamilton. From this it clearly appears that the deed was not then delivered to Hamilton as the agent of the Company, but in fact, as the agent of Rucker—Hamilton was to act in the matter of the receipt of the purchase consideration, and delivery of the deed for Rucker and as his agent. Afterwards, about the 9th day of October, 1868. Rucker for some reason, not satisfactorily explained by him, went to Hamilton and verbally stated to him that he wished to make an unconditional, delivery of the deed to him, and then and there directed Hamilton to present the same to the Recorder of Nicholas county for recordation, and after the same was recorded in said office to withdraw the original and send it to the Recorder of Clay county to be recorded in his office; and on the 9th day November, 1869, Hamilton, as directed by Rucker, delivered the deed to the Recorder of Nicholas county, to be recorded. Hamilton in his deposition says that Jos. A. Alderson and himself were appointed local agents of the Company, as

I understand him, for the purchase of lands in its 8 per cent. preferred stock, but he does not state when, how or by whom he was appointed, or that he ever made any purchases for the Company. He says Henry M. Mathews the general agent directed him in several letters to obtain deeds from all parties whose contracts had been approved by the Company, but does not state when any of the letters were received, and that he understood without saying from whom, that the contract of Rucker had been accepted by the Company, and he is under the impression that he was told by some one connected with the business, but he does not say who or how connected with the Company's business, that it was necessary to record the deeds before forwarding. He does not state that he ever forwarded this deed to the Company. Farther on Hamilton is asked what instructions were given you by H. M. Mathews, the general agent of the Company as to procuring and forwarding deeds for lands sold by parties to it, and in answer thereto he says Major H. M. Mathews directed him to procure deeds from all persons who had "subscribed" lands to the Company and in which the contracts had been "approved" and forward the same, in several different letters &c.

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Under these circumstances it would be unjust and unauthorized, to hold that the Company had accepted the deed to the deed because Hamilton delivered the deed to the Recorders of Nicholas and Clay counties as directed by Rucker. I think it is clear that in doing as he did, in this respect, he was acting under the direction and authority of Rucker, and not of the Company. According to the most liberal construction of his evidence he was only authorized to receive deeds upon such contracts as had been approved by the Company. He did not make this contract, and so far as appears, he knew nothing of its import, or anything touching the action or proceedings of the arbitrators or surveyor. It does not appear that he ever saw or examined any of the lands in

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any capacity, or that he was informed by any person who could bind the Company that the contract or award or either of them, were ever approved or adopted by the Company, after the date of the contract. From what appears Hamilton had no information in relation to this contract, except such as he derived from Rucker, and was in a condition to be imposed up by him. Why did not Rucker deliver this deed to Alderson, the agent who made the contract, if he expected it to be accepted? No excuse or reason is assigned by Rucker for not doing so. It may be appropriately asked why Rucker changed his mind so soon after he delivered it to Hamilton as an escrow? At that time he was not willing to trust the Company with the deed until the consideration was paid. His change of mind in this respect is not satisfactorily explained. I do not think it can be justly said that the Company accepted the deed upon a reasonable view of the case and the circumstances as developed by the record.

There is no proof of the allegation that the stock in question was represented in the general meetings of the stockholders of the Company, that I have been able to find in the record outside of Rucker's allegation.

If the contract and award were not obnoxious to fraud, &c., and it were proper to enforce them as against the Company, still, under the provisions of the first and second sections of chapter one hundred and eighteen of the code of Virginia, of 1860, which were in force in this State at the date of the contract, &c., as well as the first and second sections of chapter seventy-four of the code of this State, which took effect the first of April, 1869, and the principles settled in the cases of *Chamberlayne v. Temple*, 2 Rand, 384; *Garland v. Rives*, 4. Rand, 282, 310; *Hutchison v. Kelly*, 1 Rob., (Va.) 123; *Hunters v. Waite*, 3 Gratt., 26, the provision or settlement contained in the contract for the benefit of Rucker's wife would be held fraudulent and void. As to the plaintiff Dickinson's debt, except perhaps as to so much thereof as would be a just equivalent for the right of dower relin-

quished by the wife by the deed of Rucker and wife to the Company, but as to this exception, I do not now determine. In the case of *Garland v. Rives*, judge Green, in delivering the opinion of the court, says: "To this class of cases may be referred those cases in which a husband stipulating to settle on his wife a just equivalent for her right of dower, relinquished with a view to defraud his creditors, settles property grossly exceeding in value the dower, in which case it was held that the deed was valid, so far as to secure the just equivalent, and void as to the surplus. In these cases, the wife is held to be an innocent and *bona fide* purchaser, to the extent of the value of the dower right relinquished, and the fraud of the husband is not imputed to her. But if she were *sui juris*, and concerned in the fraud, the deed would be wholly void under the statute of frauds and perjuries."

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It must be taken in this case, under the pleadings, and evidence as against Rucker, his wife and Bryan, that, though Dickinson's judgment was obtained after the contract, and the date of the deed of Rucker and wife, his debt for which the judgment was rendered, existed before, and at the time the contract was made. But, if the contract and award were good, and also the deed of Rucker and wife, to the Company, then I apprehend the judgment would not be a lien upon any part of the stock to be issued, as a judgment is only a lien upon real estate. In as much as the contract, so far as it settled the stock upon Mrs. Rucker, is fraudulent and void as to Dickinson's debt, to the extent I have stated, to that extent, the stock would be liable to Dickinson's debt, even though there had been no judgment or execution thereon. Code of 1860, chap. 179, sec. 2, and Code of W. Va., chap. 133, sec. 2. But the contract never was recorded, nor the deed accepted by the Company in my judgment, as hereinbefore stated.

If the contract of sale to the Company, and the deed of Rucker and wife to the Company are set aside, and annulled, as they must be, for the reasons herein stated,

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then Dickinson's judgment constituted a lien upon the bonds mentioned in the deed and contract, and should be, as far as necessary, subjected to sale therefor, unless it is paid. But the sale should be made subject to the dower of Mrs. Rucker, if she survives her husband. I do not determine anything as to the liability to Dickinson's debt or judgment of any of the real property in his bills mentioned, other than that alleged to be sold to the Company, as I deem it improper to do so in this appeal. In this case the cross-bill may be considered as a defence to the original, or a proceeding necessary to a complete determination of a matter already in litigation. Story's Eq. Plead, sec. 399.

For these reasons the decree rendered by the Circuit Court of Greenbrier county, in these causes, on the 26th day of April, 1872, must be reversed and annulled, and the appellant recover against the appellee, William P. Rucker, its costs about the prosecution of its appeal, in this Court, expended.

Paull and Moore, Judges, concurred. Absent, Hoffman, Judge, by reason of sickness.

The decree entered in this case was as follows: And this Court, proceeding to render such decree as the said Circuit Court should have rendered in said causes, it is adjudged ordered and decreed that the contract of sale of the lands in the original and cross-bills, in these causes, mentioned, bearing date the 20th day of June, 1868, between the defendant, William P. Rucker, and the Chesapeake and Ohio Railroad Company, and executed by the said William P. Rucker, for himself, and J. A. Alderson, agent for the appellant, and the award or valuation, of George Brown, S. J. Grose, and Joseph Copenhaver, fixing the value of the "Bend of Gauley" farm at \$16.50 per acre, and dated the 6th day of July, 1868, in said bills mentioned, and the certificate or award of J. Haymond Robinson, surveyor of Nicholas county, dated August the 3d, 1868, and in said bills mentioned,

certifying that, by calculation, he finds the "Bend of Gauley" farm, in the said contract mentioned, to contain eighteen hundred and sixty-six acres of land including one-half the width of Gauley river, from a water birch on the bank of same, a distance of eight hundred and sixty poles long, allowing the half-width of the river to be eight poles; and the deed from the defendants, William P. Rucker and Margaret A. Rucker, his wife, to the appellant, dated the 18th day of September, in the year 1868, and of record in the counties of Nicholas and Clay, in this State, in said causes mentioned and referred to, purporting to convey to the appellant, (the Chesapeake and Ohio Railroad Company) "the three following tracts of land with general warranty, to-wit:

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*First.* A tract of eighteen hundred and sixty-six acres, lying in the "Bend of Gauley" river, in Nicholas county, West Virginia, adjoining the lands of S. J. Grose, Jos. Copenhaver, A. J. Kyle, and others, and being the same lands conveyed to said Rucker by James A. Foster, R. G. Foster, A. B. Foster, D. R. Hamilton, Oliver S. Jones, Jeremiah Nutter, and Jacob Copenhaver;

*Second.* Of two hundred and fifty acres, lying in Nicholas county, West Virginia, on the waters of Buck's garden, Buffalo and Mumblethepeg creeks, about nine miles north of the Court-house, and adjoining the lands of Levi J. Hooker, John Rapp, Major Burroughs, and others, and conveyed to Rucker by said Levi J. Hooker; and;

*Third.* A tract of one hundred and seventy-five acres, lying in Clay county, West Virginia, on waters of Elk river, known as the John Legg farm, three and a half miles north of the Court-house, adjoining lands of Samuel Martin, Smith Henshaw and others, and conveyed to said Rucker by John Legg," be, each and all, cancelled, rescinded and annulled, and they, each and all, are hereby declared null and void and of no effect. It is further adjudged, ordered and decreed that the said Chesapeake and Ohio Railroad Company do recover against the de-



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pendants to its cross-bill, filed in this cause, its costs, expended in and about the prosecution of the same, in the Circuit Court.

It is further adjudged, ordered and decreed, that the said original cause of Russell J. Dickinson against William P. Rucker and others, be remanded to the said circuit court of the county of Greenbrier for further proceedings therein to be had, and the said circuit court may, if it be desired, appoint a special commissioner to reconvey with covenants of special warranty, to the said William P. Rucker, for, and on behalf of, the said Chesapeake and Ohio Railroad Company, by deed properly acknowledged, whatever legal or equitable title or interest, of every description, which may have passed from the said William P. Rucker and wife, by their said deed bearing date the 18th day of September, 1868, to the said Chesapeake and Ohio Railroad Company, for the lands in said deed mentioned and described and every part thereof, and the said circuit court may further proceed in said original cause, and make such further orders and decrees therein as are in accordance with the principles announced in this opinion, so far as they apply, and as are in accordance with the rules and regulations governing courts of equity, and that the said Russell J. Dickinson have leave to file an amended bill making James A. Foster a party to said original cause and any other persons necessary and proper to be made parties thereto, and that said Dickinson have leave to file in said original cause an official copy of the said judgment against William P. Rucker to be read as evidence and to have such force as it is entitled to have.

DECREE REVERSED, AS TO ORIGINAL BILL, AND  
SUIT REMANDED.

## CHARLESTON.

DAVIS &amp; MOORE v. WALKER.

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A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and, although an appellate court will supervise the action of the court, on such a motion, it will not reverse a judgment, on that ground, unless such action is plainly erroneous.

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Writ of error and supersedeas to a judgment of the circuit court of Kanawha county, rendered on the 26th day of May, 1873, in a suit therein pending, wherein Davis & Moore were plaintiffs, and Henry S. Walker, was defendant. The case was brought here by the defendant Walker. The only question involved in the case was as to the correctness of the decision of the court below, overruling the motion of the defendant for a continuance. The facts upon which the motion was based, were set out in two several bills of exception taken to the ruling of the court and sufficiently appear in the opinion of this Court.

The Hon. Joseph Smith, judge of said circuit court, presided at the trial below.

*Laidley & Hogeman*, for the appellant.

*Thomas B. Swann and Mollohan & Nash*, for the appellees.

HAYMOND, President:

This is an action of trespass on the case in assumpsit, brought by the plaintiffs against the defendant, in the circuit court of the county of Kanawha. The declaration

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in the cause was filed on the — day of —, 1872. On the 29th day of March, 1872, the defendant appeared in court, to the action, and filed a general demurrer to the declaration, in which the plaintiff joined and the defendant pleaded *non assumpsit* and payment and set off on, each of which pleas issue was regularly joined. The defendant also filed an account with his pleas of payment and set off, but the account does not appear in the record. On the 30th day of March, 1872, the cause was continued, on motion of the defendant and at his costs. Afterwards, at another term of the court, held on the 26th day of July, 1873, the cause was again continued on motion of defendant and at his costs. At the October term of the court, held in 1872, the cause was continued generally. On the 26th day of May, 1873, plaintiffs and defendant appeared in court, and the demurrer filed to the declaration was overruled. The defendant, by leave of the court, withdrew his plea of sets off and specifications filed therewith, and a jury was duly empanelled and sworn to try the issues joined, and found a verdict in favor of the plaintiffs for \$428.04, and the court gave judgment therefor against defendant. On the trial of the cause, the defendant, by his attorney, excepted to certain rulings and orders of the court made in the cause, which exceptions, being two in number, were signed, sealed and made part of the record.

The cause is before us upon a writ of *supersedeas*. From bill of exceptions, No. 1., it appears that when the cause was called for trial the defendant moved the court to continue the same at his costs; and in support of his motion, read to the court his affidavit, which is, in substance, that Lewis Baker is a material witness for him in the cause; that he has been duly summoned therein as a witness to this term; that he cannot prove by any other witness what he expects to prove by Baker; that said Baker is not in attendance, although after receiving the subpoena, he sent word that he would be in attendance. This affidavit was sworn to, on the day of the trial,

in Kanawha county. The defendant also proved, in support of his said motion, that a subpoena had been sent to the witness Baker, by the defendant, by mail, and that the said witness had acknowledged receiving said subpoena, and had telegraphed the defendant that he would attend the court. The defendant also proved that the witness Baker had sent him word that he would be at the court on the Friday previous. But it was proved to the court that the case had been continued at two former terms of the court, on the motion of the defendant, and each time on account of the absence of the witness Baker, who though summoned, had, at each of said two terms failed to attend; and that the defendant had, for each non-attendance, at said two former terms of the court, taken no rule or attachment against said witness to compel his attendance. It was also proved that the witness Baker resided in the city of Wheeling, county of Ohio, in this State; and the city of Wheeling was agreed and admitted to be more than one hundred miles distant from the place of holding the court, and that the defendant had taken no steps to procure the deposition of said witness. The defendant also proved that he had been advised, by his counsel, that it was important to have Baker's personal appearance on the trial. Upon this state of facts, the court overruled defendant's motion for a continuance and directed a jury to be empaneled, and the trial of the cause to proceed. The only question presented by this bill of exception is, did the court, under the circumstances stated, err in refusing to grant the defendant the continuance asked for. "When a witness for either party fails to appear at the time appointed for the trial, if such party show that a subpoena for the witness has been returned executed, or that a subpoena was delivered to the proper officer of the county or corporation in which the witness resides, a reasonable time before the commencement of the term, and shall swear that the witness is material, and that he cannot safely go to trial

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without his testimony, the court will generally grant a continuance to the party at his costs." 1 Rob. Prac., (old) 250. In the case of *Fiott v. the Commonwealth*, 12 Gratt. 576, judge Allen, in delivering the opinion of the court says: "Applications for continuances are addressed to the discretion of the court, and much must be left to the tribunal which has the parties before it, and must determine, from a variety of circumstances occurring in its presence, whether applications for continuances are made in good faith or are merely intended to protract the controversy: And even when made in good faith a reasonable degree of diligence should be exacted. The opposite party should not be kept in court and exposed to the risk of losing his testimony 'by the negligence of the other side.'" In the case of *Hewitt v. The Commonwealth*, 17 Gratt. 627, it was held "that a notice for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and although an appellate court will supervise the action of an inferior court on such motion, it will not reverse a judgment, on that ground, unless such action was plainly erroneous. And that, as a general rule, where a witness for a party fails to appear at the time appointed for the trial, if such party show that a subpoena for the witness has been returned executed, or, if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides, a reasonable time before the time of trial, and shall swear that the witness is material, and that he cannot safely go to trial without his testimony, a continuance ought to be granted, if there be reasonable ground to believe that the attendance of the witness at the next term can be secured; especially if the case has not been before continued for the same cause." Courts of justice are maintained at great cost by the public for the convenience and benefit of suitors, or for the adjustment of controversies between men. And it is but reasonable and proper, ordinarily, that persons having suits in court shall be held to the exercise of reasonable diligence by

the courts, in prosecuting or defending their suits. In order that suitors may be able to get ready for trial, at the time for which their causes are set, they are given access to the process of the court to summon and compel the attendance of their witnesses. But if the suitor expects the indulgence of the court, he must be diligent in the use of its process. He must, generally, have exercised such diligence in the use of the process of the court, as will authorize the court, if the witness is not in attendance when the cause is called for trial, to take the legal course to compel the attendance of the witness. If the suitor is negligent and inattentive in this respect he cannot expect indulgence at the hands of the court. He must not simply rely upon the witness as to his attendance, especially where he has been in default, by disobeying the process of the court, but he can only safely rely upon the diligent and proper use of the process of the court in proper time. Justice to the public, and even to the suitors, demands, ordinarily, that reasonable diligence should be required of suitors in preparing for the trial of their causes. It is sometimes difficult to procure the attendance of witnesses, by the exercise of proper diligence, and sometimes it is very expensive to do so. To meet and obviate these difficulties and obstacles, the law has provided, in civil cases, that where the witness is not a resident of the State, or resides within the State, more than one hundred miles from the place of trial, and even in a different county from the place of trial, that the deposition of the witness may be taken and read as evidence, and, ordinarily, though perhaps not universally, in actions of account, the deposition of the witness accomplishes every purpose to be attained by his personal presence. In the case before us the witness Baker, though duly summoned to attend at the previous terms, failed to obey the process of the court, and by reason of his absence, the court granted the defendant, on his motion, a continuance each time; still the defendant took no steps, whatever, on either of these occasions, to compel

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the attendance of the witness in the future. The defendant, before the trial, caused a subpoena to be issued for Baker to attend court as a witness in his behalf, but instead of sending the subpoena to an officer, or other person, in Ohio county, to be executed and so returned, he inclosed the subpoena in a letter, sent by mail, to Baker himself. How long this was done before court does not appear, and it does not appear that the subpoena was ever served, otherwise than that Baker acknowledged receiving it, and had telegraphed the defendant that he would attend the court at that term. From this it is clear that the defendant, without any sufficient reason, in point of law, trusted and relied, alone, upon Baker's willingness or convenience to attend the court as a witness, and not on the power and efficacy of process of law to compel his attendance. When the case was called for trial, defendant did not show to the court that the subpoena had been duly executed on Baker, and ask for a rule against him for disobeying the process of the court, but simply, upon the facts stated, as shown by the bill of exceptions taken to the opinion of the court refusing the continuance, asked the court to continue the cause. He did not take, or attempt to take. Baker's deposition in the cause, although he had ample time to have done so. True, the defendant proved that he had been advised by his counsel that it was important to have Baker's personal appearance at the trial. If defendant deemed it important to have the personal presence of Baker at the trial, instead of his deposition, it was his duty to have exercised reasonable diligence to have procured his attendance. The judge of the circuit court was of opinion, under the circumstances stated, that the defendant had not exercised reasonable diligence to procure the attendance of the witness Baker; and, according to the law, as settled by the cases above cited, we do not feel authorized or justified to declare that the judgment of the circuit court, in this respect was, or is, plainly erroneous. In cases of this kind we are not authorized to revise the judgment of the court

below, except we are satisfied that the judgment is plainly erroneous.

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The bill of exceptions No. 2, is taken to the opinion of the court overruling the motion of the defendant, made after verdict, for a new trial. The motion made for a new trial is not because the verdict is contrary to the law and evidence, or because of the discovery of new and material evidence since the trial, but because the court did not continue the cause, when it was called for trial, on account of the absence of the witness Baker. The defendant, in his affidavit filed in support of his motion for a new trial states some facts that were not proved to the court on the motion for a new trial, but no sufficient reason is shown why these facts were not proved to the court on the motion for continuance; and if they had been proved they do not materially change the case from what it was on the motion for continuance; all the other facts that appear by bill of exceptions No. 1, appear in bill of exceptions No. 2. Under the circumstances, as they appear by the record, and the law as applicable to those circumstances, we do not feel authorized to decide that the court below erred in overruling the defendant's motion for a new trial. If we were to reverse the judgment complained of, under the circumstances appearing in this case, we would establish a precedent which would most certainly exercise a pernicious influence upon the administration of justice in the inferior courts, and inflict a great injury upon the public.

It was not insisted before us that the court erred in overruling the demurrer to the declaration. But we have examined the declaration, and do not see that the court below erred in its judgment in this respect.

For these reasons the judgment of the court below must be affirmed with costs in this court and \$30 damages in favor of the appellees.

The other Judges concurred.

**JUDGMENT AFFIRMED**



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## CHARLESTON.

## BAKER v. OIL TRACT COMPANY.

March 2, 1874.

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I. S., conveyed a tract of land in Wirt county to W., and F., trustees for the R. O. T. Co. The R. O. T. Co., is a foreign corporation and is indebted to B. And B., to collect his debt, sued out, in chancery, a foreign attachment against the R. O. T. Co., as a non-resident of this State and caused the same to be levied on said tract of land and some personal property. The R. O. T. Co., before the cause was heard, appeared in Court and filed its answer to B's., bill, contesting his alleged debt. On the hearing of the cause, on the bill, answer, depositions, &c., the circuit court rendered a personal decree against the R. O. T. Co., for the amount of B's., debt or claim and the costs of suit, and also decreed that so much of said land and personal property on which the attachment was levied, as should be necessary to pay the said debt and costs of suit, be sold, for cash, for that purpose, &c.—  
HELD:

1. That, as the R. O. T. Co. appeared and answered, it was not error for the circuit court to render a decree against it for the amount of B's. debt and costs of suit.
  2. That it was error in the circuit court to decree the sale of the land without W. & F., the trustees, being made parties to the cause.
  3. If the decree of sale had been otherwise correct, it was not error to decree the sale to be made for cash.
- II. When a decree in a cause in chancery is made directing the sale of real and personal property by a special commissioner, to pay a debt, for cash, it is generally proper, that the decree should require bond with good personal security to be given before the court, or given and filed with the clerk of the court, before the sale shall be made, in a penalty fixed in the decree, and conditioned according to law.

- III. In a suit or proceeding by foreign attachment in equity, to collect the price of two oil tanks, it is competent for the defendant to plead and rely on a breach of warranty, as to the quality of the material of the oil tanks in reduction or abatement of the price, and when such defence is plead and relied on in the answer, it is unnecessary to file a cross-bill for that purpose.
- IV. It is not error in a circuit court to refuse to allow a defendant to file a cross-bill in a chancery cause, praying a suspension of further proceedings in the original suit, until an account prayed in the cross-bill can be taken, when the filing of the cross-bill has been unreasonably delayed, and especially where the complainant in the cross-bill fails to state any reason for such delay.

An appeal by the Rathbone Oil Tract Company from a decree rendered on the 27th day of November, 1871, by the circuit court of Wirt county, in a suit in chancery therein pending, wherein J. W. Baker was complainant and said Oil Tract Company and S. P. Wells, were respondents.

The facts in the suit sufficiently appear in the opinion of the Court.

The Hon. George Loomis, judge of said circuit court, presided at the hearing below.

*John A. Hutchinson, Jr.* for the appellant.

*Okey Johnson and Walter S. Sands,* for the appellee.

HAYMOND, President :

This is a case of an attachment in equity. Complainant proceeded against the Rathbone Oil Tract Company, as a non-resident of this State, and its agent Wells, alleging that the Company had, at the commencement of the proceeding, estate in the county of Wirt, in this State. The proceeding was commenced in February, 1867, the summons on which the attachment was endorsed was made returnable to the first Monday in March, after the date thereof. The attachment was levied, as appears by the return of the Sheriff, on all the right, title and interest of the Rathbone Oil Tract Company, in and to the tract of land situated on the Little Kanawha river, Burning Spring Run &c., in Wirt county, and all the partnership property, in said county, formerly owned by Rathbone and

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Camden, and the individual property of J. V. and J. C. Rathbone, which was conveyed to Wm. Whiteright, Jr., and J. P. Girard Foster, in trust for the said defendant Rathbone Oil Tract Company by William P. Stratton, by deed dated the 9th day of November, 1861, and recorded in deed book No. 5, 279 &c., of the records of Wirt county, to which reference is made, for a better description of the land. This levy was made on the 15th day of February, 1867. Some oil tanks on said land were also levied upon. The complainant filed his bill in the cause, at March rules 1867. The complainant, in his bill, alleges, that the Rathbone Oil Tract Company is a foreign corporation created under the laws of New York, and that said Company through its agent, S. P. Wells, purchased from him on the — day of October, 1866, two oil tanks, of the capacity of twelve hundred barrels each, amounting to twenty-four hundred barrels, at the price of 75 cents per barrel, amounting to the sum of \$1,800; that complainant, for the sum aforesaid, was to set up the tanks within a reasonable time, when notified by the Company; that the purchase money was to be paid in thirty days; that he was always ready and willing to set up said tanks at any time, but was not notified of the Company's readiness to have the same set up; that said Company also purchased from him some other articles, amounting in the aggregate to \$42.05; that the Company is justly indebted to complainant in the sum of \$1,842.05, with interest on \$1,800, part thereof from the 31st day of October, 1868, till paid, and on \$42.05 residue thereof from the 31st day of December, 1866, subject to a credit of \$1,000.00 paid by the Company's said agent (Wells) the 16th February, 1867, after the commencement of this suit. The bill also alleges that the attachment issued in the cause was levied on a tract of land at Burning Springs, in said Wirt county, conveyed by William P. Stratton to Wm. Whiteright and J. P. Girard Foster, trustees for said Rathbone Oil Tract Company. The summons in the cause was executed on Wells, and on the

30th day of May, 1868, the Company appeared in court, and filed its answer to the bill, to which complainant filed a general replication. On the 27th day of November, 1871, the Company appeared in court, and asked leave to file a cross bill in the suit, but the court refused to grant the leave. On the 27th day of November, 1867, the same day that leave to file a cross-bill was refused, the cause was regularly heard on bill, answer of the Company, general replication thereto, proofs in the cause, attachment levied &c. And the circuit court decreed that complainant recover of the defendant Rathbone Oil Tract Company the sum of \$1,842.05, with interest thereon from the 16th day of February, 1867, subject to a credit of \$1,000.00 paid on said 16th day of February, 1867, and the further sum of \$150.00, paid February 8, 1867, together with the costs of suit. The court also decreed, in the same decree, that unless the said Rathbone Oil Tract Company, or some person for it, within twenty days from the date of the decree, pay the amount decreed to be paid, that W. S. Sands, who was appointed a special commissioner for the purpose, proceed to sell so much of the property attached in the cause as shall be sufficient to pay complainant's debt interest and costs. It appears that the papers of the cause had been submitted to the court for hearing some time before the Company offered to file its cross-bill, and that the court was then ready to pronounce its decree. From this decree the Rathbone Oil Tract Company have appealed.

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The *first* error assigned and relied upon before us is "that the court below erred in decreeing the sale of the lands attached, because the bill shows that the trustees, holding the legal title to the lands on which the attachment was levied, were not made parties to the suit." The bill does show on its face that the lands on which the attachment was levied were conveyed by William P. Stratton to Wm. Whiteright, and J. P. Girard Foster, trustees for said Company. The bill professes

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to file a copy of the deed from Stratton to Whiteright and J. P. Girard Foster, trustees for said Company as an exhibit, but the copy no where appears in the record. From the allegations of the bill and the returns of the Sheriff made upon the attachment in relation to the land, I think the fair conclusion is that the land was conveyed by Stratton to Whiteright and Foster, in trust for the said Company, or for its use. This being so, the legal title to the land, so far as is disclosed by the record, is still vested in the trustees. In cases of trust, Judge Story in his Equity Pleadings, sections 207 and 209, says: "The general rule in cases of this sort is, that in suits respecting the trust property, brought either by or against the trustees. the *cestuis que trust* (or beneficiaries,) as well as the trustees, are necessary parties. And where the suit is by or against the *cestuis que trust* (or beneficiaries,) the trustees, also, are necessary parties. The trustees have the legal interest, and therefore they are necessary parties. The *cestuis que trust* (or beneficiaries,) have the equitable and ultimate interest to be affected by the decree, and therefore they are necessary parties." Cooper's Eq., Pl.,—34. The legal title to the land levied on in this case being in the trustees it was error in the court below to decree the sale of the land to pay the debt before the trustees were made parties to the cause. Although the mere naked legal title to the land may be vested in the trustees in this case for the use of the Company, still it is proper and necessary for the trustees to be before the court, so that if a sale is decreed, the court may be able by its decree, to pass the legal title to the purchaser, as well as the equitable right. There was no demurrer to the bill, because the trustees were not made parties, and, so far as the record discloses, no objection was made in the court below because the trustees were not parties to the cause. Still the appellate court will reverse a decree for the want of necessary parties, though the objection was not taken in the court below. *Taylor's Admr., v. Spindle*, 2 Gratt., 44;

*Jameson's Admx., v. Deshields*, 3 Gratt., 4; *Richardson v. Davis and wife*, 21 Gratt., 706.

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"The *second* error assigned is that "the court erred in not quashing the attachment and dismissing the proceedings thereon." No reason was stated in argument in support of this error and in fact it was abandoned in argument by the appellant's counsel. No reason having been given why this assignment of error should be sustained, and being unable to see any, this assignment of error must be overruled.

The *third* error assigned is that "it was error to refuse the filing of the cross bill. No relief could be given upon appellant's answer. After the answer was filed and proofs taken, Baker, the appellee, removed from the State and became a non-resident insolvent. The Company's said cross bill sets up, substantially, the same matters against complainant, as are relied on in the answer of the Company in its defense, chief and most important of which is, that the oil tanks were warranted to be of first class quality, as to material of which they were constructed, whereas, in fact, they were made of inferior lumber, and were not of first class, as agreed to be constructed, &c. Benjamin on Sales, 680, says: "Where the goods delivered to the buyer are of inferior quality to that which was warranted by the vendor, the buyer has three remedies: *First*. He may refuse to accept the goods, and return them, except in the case of a specific chattel in which the property has passed to him, as explained in the preceding chapter. *Second*. He may accept the goods and bring a cross action for the breach of the warranty. *Third*. If he has not paid the price, he may plead the breach of warranty in reduction of the damages in the action brought by the vendor for the price." If this had been an action of assumpsit to recover the price of the oil tanks the Company would be entitled, on a proper issue being made, to have deducted or abated from the actual price, so much as it proved itself entitled

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by reason of the breach of warranty, if there was a warranty satisfactorily proven. In the case of *Ward v. Fellers*, 3 Mich., 281, being an action of assumpsit, it was held and supported by an able opinion delivered by judge Martin, who delivered the opinion of the court, that "where the defendant having a demand against the complainant springing out of the same contract or transaction upon which the suit is brought, elects to use his claim by way of recoupment, he can only set it up in abatement, and can not go beyond that, as in set off, and have a balance certified in his favor. The defence of recoupment is distinguishable from that of set off in the following particulars: 1st. In being confined to matters arising out of, and connected with the transaction or contract upon which the suit is brought. 2d. In having no regard as to whether such matters are liquidated or unliquidated. 3rd. That the judgment is not the subject of statutory regulations, but controlled by the rules of the common law." The defendant has the election whether he will set up his claim in answer to the plaintiff's demand or resort to his cross action. See opinion of court in the case last cited, 289. It seems to me that the doctrine stated in Benjamin on Sales and in the case in 3 Mich., is reasonable and just and should prevail in this State in proper cases, and that such is the true common law rule without reference to statutory provision or rules of equity.

The complainant's demand in the case before us is a legal, and not an equitable demand, and this suit is a proceeding in equity to enforce the legal demand by foreign attachment, based upon a statute, and the defendant is, and should be, entitled to make at least such defences against the plaintiff's demand, in whole or in part, as he would be entitled if the case were an action at law, leaving out of view equitable defences. On the examination of the Company's answer, I feel satisfied that if the Company had succeeded in establishing the warranty, and breach thereof, stated and set up in the answer, it would be entitled to a de-

duction or abatement from the contract price of the two oil tanks, to such an amount as it was proven to be justly and legally entitled, by reason of the breach of warranty; and I furthermore think, from the character of the answer, that it may be assumed that the Company did elect to rely upon such defence, by way of recoupment, though the answer does not so state, in express words. It then being competent for the court to allow the Company a deduction or abatement from the contract price of the two oil tanks, and the Company having taken evidence on that subject, tending to support that defence, it was, in fact, unnecessary to file a cross-bill for that purpose. I think, however, that considering the whole evidence in the cause, the Company's claim of a warranty, and that it has sustained damages by reason of a breach thereof, by the complainant, is not satisfactorily established. Again, even though it were allowable for the Company to file its cross-bill in this case, if offered at the proper time, still it is clear that it was not proper to allow it to file it at the time it was offered, to operate as prayed. It had certainly been delayed an unreasonable time, and no excuse whatever is given for the delay. The reason mainly urged here, why it should have been allowed to have been filed, as prayed, and to have the effect of staying or suspending further proceedings in the original suit, until an account was taken of the matters set up in the cross-bill, as therein prayed, is that the complainant, Baker, had become a non-resident of the State since the commencement of the original suit. Baker's deposition is taken in the cause. It was taken on the 28th day of July, 1869, and in his deposition, he, (Baker,) says that he resides in Omaha, Nebraska. More than two years after Baker's deposition was taken, the Company offered its cross-bill. During this two years the Company must have known that Baker was not a resident of this State. Again, all the proofs in the cause were taken more than two years prior to the offering to file the cross-bill. The offer to file the cross-bill, un-

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der the circumstances of this case, was unreasonably delayed, as no reason or excuse is given for such delay. The court will not suspend the hearing of the original cause on account of a cross-bill, when that cross-bill has been filed at an unreasonable period.—Rob. Old Prac., 319, and cases there cited. The appellants third assignment of error must, therefore, be overruled.

The *fourth* assignment of error is, that “it was error to decree for the appellee, upon the pleadings and proofs in the cause.” On a careful examination of the evidence disclosed by the record, I am of opinion that the court below did not err in rendering a personal decree against the said Company, (as the Company had appeared and filed its answer in the cause,) for the amount stated in the decree, together with the costs of the suit. While the evidence adduced by complainant and defendant is somewhat conflicting, the weight of the evidence is in favor of the complainant’s claim against the Company, as to amount, as ascertained and adjudicated by the court below, in its decree rendered in the cause on the 27th day of November, 1871. The fourth assignment of error must, therefore, be overruled.

The *fifth* assignment of error is that “the mechanic’s lien of P. D. Rees was a proper set off, and should have been allowed.” As to this assignment, it is sufficient to say that the record fails to disclose proof of any such mechanic’s lien.

The *sixth* assignment of error is that it was error to decree the sale of the land for cash, and not to require the special commissioner to give bond with security, conditioned according to law, before making the sale. Under the statute, as it was at the date of the decree of sale, it was certainly not error to direct the sale of the land to be made for cash. But as the sale was directed to be made for cash, both of the real and personal property levied on, I think the court ought to have required the commissioner to give bond, with good personal security, in a penalty fixed by

the court, conditioned according to law. It seems to me this is the better practice, and should be adhered to, especially as the law requires that such bond and security shall be given before the commissioner is authorized to receive any money upon the sale. While this might not be sufficient cause for reversing a decree of sale in all cases, still I think it is much the better practice where sales are decreed for cash in hand, to require the special commissioner, before he makes sale, to execute and file the bond; and this would seem to be contemplated by the law.

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The appellee, by his counsel, has asked us if we were of opinion that the personal decree rendered against the said Company was authorized by the evidence to strike out so much of the decree as directs the sale of the property and appoints a special commissioner, &c., and leave the personal decree against the Company for the money and costs of suit, standing in full force against the Company. The decree in this cause is, on its face, very similar in form, to the decree in the case of *Woodson, Trustee, v. Perkins*, 5 Gratt., 345. In that case there was a personal decree against the plaintiff for a sum of money, followed, as in this case, with a provision that unless the money was paid within a specified period, that certain slaves should be sold, &c., and directed to whom the proceeds of sale should be paid. But the court said it was an interlocutory decree, and that no execution could issue on the decree, for the money decreed, without leave of the court. And that, as there was no ground for a personal decree against the plaintiff, who was a mere trustee, it would have been competent for the court at any time before final decree, so to have modified the decree as to have relieved the trustee from any supposed personal liability growing out of the general terms of the interlocutory decree. The case of *Muller v. Bailey*, 21 Gratt., 521, was also cited by appellee. But I do not think these cases sustain the appellee's position in this case. The views of the judges in these cases are predicated upon the idea

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that such action may be had when the error is merely formal, and not substantial. But this is substantially a proceeding *in rem*; although, because the Company appeared and answered, it is competent to render a personal decree against it for the amount of money due and costs of suit. The original object of the suit was to obtain a judgment against the lands, and the sale thereof, to satisfy the amount of money due from the said Company to the complainant, and the decree, when taken altogether, is in fact but a decree *in rem*. No leave is given to sue out execution against the said Company upon that part of the decree which is for money, and, I apprehend, that it was not contemplated that execution should issue, without leave of the court first obtained. The decree decided the principles of the case, so far as to determine that the complainant was entitled to a decree against the lands to pay the ascertained debt and costs of suit, as the case was then presented by the pleadings and proofs, and under the law, the Company was entitled to appeal to the Supreme Court of Appeals from that decree, and to have the same reversed, if erroneous, and recover its costs against the complainant. Then, in this case, to grant the complainant's request or motion, and strike out so much of the decree as directs a sale, &c., and affirm so much of the decree as is for the money and costs of suit, and give the appellee costs against the appellant, would, in effect, change the whole character of the decree, in substance as well as form, to the manifest prejudice of the rights of the appellant. This, I do not think, should be done, especially in a case like the present.

The attachment, I think, is a lien on the oil tanks upon which it was levied, if they are not so attached to the land as in legal contemplation to be a part thereof. That the tanks are a part of the realty, there is nothing in the record to show. The bill, in effect, alleges that the oil tanks are personal property and the answer does not contest the facts, and there is no evidence in the record upon the subject. The sheriff's return says that that the

tanks are standing on the Rathbone Oil Tract Company's lands. For anything that appears in the record, the oil tanks, and the oil therein levied on, are personal property of said Company, and the court might have, properly, directed the same to be sold to pay the debt and costs, without the trustees being made parties to the suit, but not so as to the land. For these reasons, the decree of the circuit court of Wirt county rendered in this cause on the 27th day of November, 1871, must be reversed, with costs in this Court, in favor of the appellant.

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Paull and Moore, Judges, concurred. Absent Hoffman, Judge, by reason of sickness.

The following is the decree entered in this suit here :

And this court proceeding to render such decree as the court below should have rendered : It is adjudged, ordered and decreed that the complainant, J. W. Baker, recover against the defendant Rathbone Oil Tract Company the sum of \$1,842.05, with interest thereon from the 16th day February, 1867, subject to a credit, of \$1,000, paid on said 16th day of February, 1867, and the further sum of \$150, paid February, 8, 1867, and that the complainant also recover from defendant Rathbone Oil Company his costs about the prosecution of this suit in said circuit court expended, and leave is given the complainant to sue out execution thereon, if he so desires. And this cause is remanded to the said circuit court of Wirt county, with directions to said court to proceed to direct so much of the personal property levied on, as may be necessary, to be sold, if the the complainant's debt and costs are not paid or otherwise made, within some reasonable time, to be fixed by the court, if asked by the complainant ; and with further directions, if it should become necessary to resort to a sale of any part of the land on which the attachment in the cause was levied, not to proceed to make a decree to sell any part of the land to pay said debt, interest and costs, or any part thereof, until

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**Wm. Whiteright and T. J. P. Giranes Foster are made parties to this suit; and for this purpose, the complainant, if he asks it, may have leave to file an amended bill, and if the complainant does not ask a sale of the personal property, or file an amended bill making said trustees parties to this suit, or both, in a reasonable time, to be adjudged by said circuit court, then the circuit court shall dismiss the cause, as to the property attached; or the circuit court may dismiss the cause as to the property attached, at any time, on motion of the complainant.**

**DECREE REVERSED.**

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## PARKER v. CLARK.

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1. The clerk of the District Court of the United States for the District of West Virginia, is authorized to administer an oath, under the twenty-seventh section of chapter one hundred and seventy-six of the Code of Virginia, ed. 1860, in any case therein provided, the clerk of said court being embraced within the words, "or the clerk of any court."
2. An affidavit made to a petition for a rehearing, by a party not served with process, is sufficiently certified under the Code of Virginia, ed. 1860 by the following words: "Subscribed and sworn to before me this 22nd day of September, 1865," the name and official character of the certifying officer, being recognized and admitted by the parties.\*

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Appeal from an order of the circuit court of Cabell county, upon a petition of Peter Clark, on behalf of himself and others, asking an opening and a rehearing of a certain decree rendered against them, in favor of Willard Parker, in said circuit court, theretofore. So many of the facts as is necessary to an understanding of the case appear in the opinion of the Court.

\* The following, is section twenty-seven of chapter one hundred and seventy-six of the code of Virginia, ed. 1860, referred to in the opinion of the Court.

"27. In any case in which an oath might be administered by, or an affidavit made before a justice, the same may be done by or before a notary public, or a commissioner appointed by the governor, or by a court, or the clerk of any court; or in case of a survey directed by a court in a cause therein pending, by or before the surveyor directed to execute said order of survey. An affidavit may also be made before any officer of another state or country authorized by its laws to administer an oath, and shall be deemed duly authenticated if it be subscribed by such officer, and there be annexed to it a certificate of the clerk or other officer of a court of record of such state or country, under an official seal, verifying the genuineness of the signature of the first mentioned officer, and his authority to administer an oath."

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The Hon. James W. Hoge judge of the Mason circuit court, presided at the hearing below.

*Ralph Leete*, of Ohio and *Benjamin H. Smith*, and *James M. Laidley*, for the appellants.

*James H. Ferguson*, for the appellee.

PAULL, JUDGE:

In June, 1864, Willard Parker filed his bill, in the circuit court of Cabell county, to subject to sale the estate and interest of Peter Clark in certain tracts or parcels of land, lying in different counties of this State, and which had been previously assigned to said Parker, as a security for debts and liabilities due to him, by the said Clark.

On the 16th day of September, 1864, a decree was entered against the said Clark for the payment of over \$50,000, and a sale directed of his interest in the lands aforesaid, for its payment. This estate was sold by a commissioner of the court, and report of sale made and returned and confirmed by the court, by an order in said cause made the 4th day of January, 1865.

On the 26th of September, 1865, Peter Clark, on behalf of himself and others, filed his petition for a rehearing of the case under the provisions of the Code of Virginia, and the subsequent amendments thereof. This petition with the affidavit thereon, are found in the record, which recites that they were filed at that time.

At the November term, 1865, it was ordered that this petition be dismissed: whereupon, the petitioner, Peter Clark, forthwith tendered his petition *de novo*, with accompanying affidavit, and it was ordered by the court that the same be filed, &c. The record then exhibits the following proceedings; that on the 23d day of March, 1867, on petition to open decree and make defence in the case of Willard Parker, v. Peter Clark and others, came the petitioner and tendered his petition, with accompanying affidavit and bond, and it was ordered, by the court,

that the same be filed, and that summons be awarded the petitioner against the said Willard Parker, returnable to the first day of the next term of this court. The summons not being executed, an order of publication was taken against the said Parker, and on the 24th day of September, 1868, the following order was made; (after reciting that the order of publication was made, and the cause coming on for a rehearing) "that the said petitioner, upon executing a bond with good and sufficient security in the penalty of \$5,000, conditioned as the law directs, on or before the end of the next term of this court, is permitted to file his answer, and make defence to this suit, and that the suit be opened and reheard."

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In this state of the case, it seems, that in May, 1869, Peter Clark again filed his petition to have the case opened and reheard; but the judge then presiding having been counsel for Parker, no action was had, except to direct the petition to be filed and action thereon continued. At the August term 1869, the petitioner tendered a bond for costs, with surety, in the penalty of \$5000, but the judge being counsel, as aforesaid, declined to act upon the same, and the cause was continued.

The next order appearing in the record was made on the 6th of January, 1870, dismissing the petition, the counsel for Willard Parker claiming that the petition so dismissed, was the same filed in May, 1869.

The grounds on which the same was dismissed, are stated to have been, "that the clerk of the District Court of the United States, who appears to have certified the affidavit thereto, had no authority to administer oaths in cases in this court, and because the said petition is not accompanied by the affidavit required by law." The counsel for Parker moved the court to dismiss the petition on the above grounds, and it was done, accordingly. Peter Clark then moved the court to re-instate the petition and accompanying affidavit upon the trial docket of the court under the eleventh section of chapter one-hun-



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dred and twenty-seven of the Code, but the motion was overruled. The history of these proceedings appears to be confused, and this Court endeavored, by means of a *certiorari*, to obtain, if possible, a more complete or satisfactory record. The effort, however, has failed, and the questions arising must be determined as they now appear.

It is now insisted, in this Court, that the order dismissing the petition, in January, 1870, was erroneous.

If the petition had been presented to the court below, for the *first time*, in May, 1869, an order dismissing it, might have been proper, the same not having been filed within one year from the date of the decree complained of, which was made in the year 1865: See Amendments to the Code page 750, being an act passed March, 3, 1870. But this was the same petition which was filed in March, 1867, and at a previous term, and which was filed within five years from the date of the decree complained of, that being the period limited by the Code, at that time, and previous to the act of March, 1870. That this is the same petition would seem to be, apart from the fact that a writ of *certiorari* returned, shows that the record is complete, and consequently no petition filed in the cause or among the papers, has ever been lost.

This is also further evident from the fact that while the record does not show how the affidavit to the petition, filed in May, 1869, was certified, yet the order dismissing the same in January 1870, recites that it was certified by Jasper Y. Moore, clerk of the District Court of the United States, and holds the certificate of the clerk to be insufficient. And again, the petition filed in September, 1865, and the certificate thereto, as given by said Moore, clerk as aforesaid, are the only petition and certificate found in the record, and would thus indicate that they are the same that were filed, also, in 1867. Moreover, the argument of the counsel of Willard Parker before this Court, is founded now, as in the court below, upon the

alleged insufficiency of said Moore's certificate, and stating that the same petition was presented, on several occasions, and refers to it, and the affidavit, as being the same found in the record on page twenty-seven where it *first* appears. This petition, therefore, being filed in time, it was error to dismiss it, unless demanded by some principle or provision of law.

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No process ever having been served on said Peter Clark, and he having been proceeded against by publication, this petition was filed under the thirteenth section of chapter one hundred and seventy of the Code of 1860, as amended by the second section of chapter twenty-nine, of Session acts of the year 1865.

This act of 1865, required that the petition should be accompanied by an affidavit, which is now familiarly known as the "test oath;" and if the petitioner did not claim to be a citizen of this State, that he should also take an oath to support the Constitutions of the United States and of West Virginia.

It may now be observed that the act of 1865, prescribing the oath aforesaid, as a pre-requisite to the filing of the petition, has been adjudged by this Court, in different cases, to be unconstitutional and void; it was not necessary that the said oath, should accompany the petition. Not claiming to be a citizen of West Virginia, no oath to support the Constitution of this State, or of the United States, was necessary.

The only remaining ground therefore, on which it is now maintained, that said petition was properly dismissed, is, that it is not verified as required by the provisions of the Code of Virginia, existing at that time, amended as aforesaid. The twenty-seventh section of chapter one hundred and seventy-six of said Code in force at the time, provides "that in any case in which an oath might be administered by, or an affidavit made before a justice, the same may be done by a court, or the clerk of any court.

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We think this language sufficiently comprehensive to include the courts, or the clerks of the courts of the United States, holding and exercising jurisdiction within the limits of this State. They are, in some respects, recognized as courts of the State; their judgments are treated as liens upon real estate; they adopt the rules of practice prevailing in our courts, and in questions exclusively applicable to our own people, and arising under the laws of the State, they recognize the principles and adopt the authority of our decisions: This subject is more extensively discussed in the opinion delivered by Haymond, President, in the case of *Dickinson v. Railroad Company*, *infra*, to which reference is here made. It is said, however, that the certificate appended to the petition, in the following words: "subscribed and sworn to before me, &c.," is not sufficient. In the Code of Virginia no form of certificate, for the verification of pleadings, such as appears in the present Code, page six hundred and five, was prescribed. These words certainly refer to the petition, and must be held as embracing and verifying the contents of the petition. Formerly, where no form of certificate was prescribed, it was a very common and constant mode of certifying an affidavit to the contents of a paper, or of a pleading, and the very absence of all controversy and decision in our courts upon the question, may be regarded as some evidence in favor of the sufficiency of such a certificate.

And again, this form of certificate, in the same words, is prescribed in the present Code, to the affidavits of assessors of lands; see pages one hundred and seventy-four and one hundred and seventy-five; and, was also, with the omission of the word "subscribed," so prescribed for assessors in the code of Virginia, page two hundred and five.

But again it is said, that the words and letters used by Jasper Y. Moore, to designate his official character, are not sufficient for the purpose. Without passing upon this question, we think the defendant Parker is precluded

from that objection here. The record expressly recites that he, by his attorney, moved the court below to dismiss this petition for the following reason, to-wit: "inasmuch as the clerk of the District Court of the United States, who appears to have certified the affidavit thereto, had no authority to administer oaths in cases in this court." Here his official character was fully recognized and admitted, and was made the basis of the court's action in dismissing the petition.

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Upon the view of the whole case, it is adjudged, ordered and decreed that the order entered in this cause on the 6th day of August, 1869, and all subsequent orders therein made, be reversed and set aside; and this Court proceeding to make such order and decree as the said circuit court should have made in the cause, on the said 6th day of August, 1869, it is adjudged, ordered and decreed that the petition of Peter Clark and others, heretofore filed in this cause, be taken and considered as being regularly filed, heretofore, and that the bond presented to the said court on the date last aforesaid, bearing date the 5th day of August, 1869, be received and filed, and that a rehearing be granted said Clark, and the other persons named in such petition, in said cause, as prayed in the said petition; and the cause is remanded to the circuit court of Cabell county, to be proceeded in, as in such cases, the law directs and justice and equity require.

Haymond, President, and Hoffman, Judge, concurred.  
Absent, Moore, Judge.

**JUDGMENT REVERSED AND CORRECTED, AND CAUSE REMANDED.**

## CHARLESTON.

## WARREN AND WIFE v. SYME.

March 2, 1874.

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1. A writing between parties, signed and sealed, by which the owner of a lot and the owners of other adjacent lots, agree that the latter, who sinks a well on the lot of the former, shall have access to it forever, and may use water from it, at all times—the writing not indicating that the parties contemplate any further assurance—is a present grant of the right to use the well.
2. Such a deed, though containing no express declaration that the right granted shall pertain to the adjacent lots, but providing that neither of the grantees shall dispose of the easement, unless at the same time he shall dispose of his lot, by implication, annexes the servitude to the respective lots, as an easement appurtenant to each.
3. Intrinsic certainty, in a deed relative to specific property, is impossible. The description can be made certain only by proof or recognition of the identity of the subject to which it relates, or other objects or things that more or less directly and distinctly indicate and determine it. And, in the application of deeds and other documents to lands and lots, extensive latitude is allowed for the discovery and proof, not only of visible monuments or objects mentioned, but of mathematical lines of other lands and lots, and various classes of facts, to which the description or suggestions in the document may apply.
4. The certainty of a deed is determined by the principles of the common law. The recordation is regulated by the statute alone.
5. Under the law before the year 1819, when a deed was recorded it was as valid and effectual, as to all persons, as if there had been no legislation requiring recordation. But, if, before that time, there had been doubt on the subject, by section four, of chapter ninety-nine, of the Revised Code, adopted in that year, the validity of the deed, when recorded, was plainly declared.

6. Whenever the holder of land made a deed for the conveyance of an estate or the creation of a servitude or easement upon it, that was valid and effectual, as to the alienor, the deed, when duly admitted to record, became alike valid and effectual to pass the estate or create the servitude, as to any subsequent purchaser of the land, from him, for valuable consideration without notice, and as to all other persons.
 

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7. The opinion of the Court of Appeals of Virginia, expressed in the case of *Mundy v. Vawter*, and other cases considered with it, (3 Gratt., 518—see 545,) that a deed executed in 1805, for all the estate, both real and personal of the grantor, because of the want of designation and description of the lands intended to be conveyed, was not notice, in point of law, to a subsequent purchaser from the grantor, of the existence of the deed, but that the proof of notice must be such as to affect the conscience of the purchaser; though in its application to the peculiar circumstances of that case, not questioned, is as a general proposition, disapproved.
8. The clerk of a court, under the supervision of the court, must ascertain the papers filed in a case or referred to in the order book as a part of the record: Though where the papers are identified, whether they may be considered as properly a part of the record, the court alone decides.
9. A recital in a deed, under the bankrupt act of 1841, that a person was, by the United States District Court declared a bankrupt, and that the grantor was assignee and was ordered to sell the property granted, is not evidence of the facts recited, against a person claiming the property otherwise than through or under the grantor.
10. A recital in a deed of partition that a person died, and that the parties to the deed are his heirs, is not evidence of these facts against strangers.
11. Generally, parol evidence, though not excepted to when it is offered or afterwards, is not competent to prove the contents or effect of a deed.
12. Generally, a person can not be disturbed in the possession or enjoyment of property or held responsible for an act done relating to it, by any person not entitled to the property, or its possession or enjoyment.
13. A provision in a deed, creating a servitude upon an estate and annexing it to another estate, as an easement appurtenant to the latter, declaring that the grantee shall not dispose of the easement separately from the property to which it is annexed, is not a restraint upon alienation that is objectionable.

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14. A conveyance of property to which an easement is appurtenant, and without which the easement cannot be granted, made by an assignee in bankruptcy, implies the transfer of the easement with the property—Notwithstanding it does not appear that the use of the easement was necessary to the enjoyment of the property, or that at the time of the conveyance the easement was, in fact, used with the property.
15. When, by direct proof of a grant, or other sufficient evidence, an easement has been conclusively established, there may be proof of an act or declaration of the owner, indicative of renunciation or abandonment, followed by non-use for a period long enough to bar an action of ejectment to recover the possession of the land; which, when the defendant is not under disability, is ten years, and when he or she is under disability, is twenty years: Or proof of a claim by the owner of the corporeal estate, or another in his stead, known to the owner of the easement, or evinced by acts that, in the exercise of ordinary vigilance he would have learned, followed by non-use by the owner for such period: Or an act or declaration by the owner of the easement, clearly demonstrative of actual abandonment of the easement, that, in fact, promotes some action on the part of another, by which, if the easement were not held to be determined, the latter would be seriously injured: And such proof may conclude the extinguishment of the easement. But nothing less than the one or the other of these combinations of facts, will have such effect. The limited right of a husband in the inheritance of his wife, may, by such acts and declarations, be affected for the time of its duration, as the right of any other person.
16. Section thirty-six of chapter one hundred and twenty-five of the Code, which provides that every material allegation in a bill not controverted by the answer, shall, for the purposes of the suit, be taken as true, does not require a more special denial than was sufficient before its adoption. But, as formerly, the plaintiff, upon proper allegations, may interrogate the defendant, and then he will be required to answer each proper interrogatory. If the defendant does not answer properly, the plaintiff may except to the answer. When, however, he fails to do so, a general denial of the allegations of the bill, will make it necessary that the plaintiff shall prove the facts alleged and so controverted, that are in their nature affirmative.
17. A court of equity, upon a formal hearing, decrees that the defendant remove obstructions to a well which the plaintiff claims the right to use, so as to afford the plaintiff access to the well at all times, unless and until otherwise ordered by the court; and that if the obstruction be not removed within ten days, the sher-

iff, upon application of the plaintiff, shall remove it; and that an injunction previously awarded, inhibiting the defendant from obstructing the plaintiff's using the well till the rights of the claimants could be settled, shall be "continued," and that an account of the expenses of repairing the well be taken: And the court, on a final hearing, dismisses the bill:—the former decree was merely interlocutory; and the dismissal of the bill dissolves the injunction.

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18. When the plaintiff, in a bill alleges sufficient cause for making one person a defendant, but not for making others such, and seeks no relief, takes no decree *nisi*, and proves no right to relief against the latter, who make no defence, and the case being matured as to a proper defendant, the plaintiff acquiesces in a hearing; and the bill is dismissed generally; the plaintiff, upon appeal, has no right on that account, to have the decree reversed.\*

Appeal by Uriah N. Warren and, Mary Ann, his wife, from a decree of the circuit court of Greenbrier county, dismissing complainant's bill, rendered on the 28th day of April, 1871, in a suit in chancery therein pending, wherein said Warren and wife were complainants and Samuel A. M. Syme, Renick R. Dickson, St. Clair Johnson, Mark L. Spotts and Mrs. Leonard were respondents. The other material facts appear in the opinion of the Court.

The Hon. Henry L. Gillaspie, judge of the thirteenth judicial circuit, presided at the hearing below.

*Price & Sperry*, for the appellants.

*Adam C. Snyder*, for the appellee, Syme.

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\* For section thirty-six of chapter one hundred and twenty-five of the Code see *Dickinson v. Railroad Company*, *infra*. The following is section four of chapter ninety-nine, of the Revised Code of Virginia, of 1819, referred to in the opinion of the Court.

"4. All bargains, sales and other conveyances, whatsoever, of any lands, tenements or hereditaments, whether they be made for passing any estate of freehold or inheritance, or for a term of years, and all deeds of settlement upon marriage wherein either lands, slaves, money or other personal thing shall be settled or covenanted to be left or paid, at the death of the party or otherwise; and all deeds of trust and mortgages whatsoever which shall hereafter be made and executed, shall be void, as to all creditors and subsequent purchasers 'for valuable consideration, without notice,' unless they shall be acknowledged or proved, and 'lodged with the clerk to be' recorded, according to the directions of this act; but the same, as between the parties, and their heirs, 'and as to all subsequent purchasers, with notice thereof, or without valuable consideration,' shall nevertheless be valid and binding."



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HOFFMAN, JUDGE :

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In September 1869, William H. Church and Uriah N. Warren and Mary Ann Warren, his wife, exhibited their bill in equity against Samuel A. M. Syme, Renick R. Dickson, St. Clair Johnson, Mark L. Spotts and Mrs. Leonard ; in which the plaintiffs allege :

That, in October 1833, an article of agreement was entered into between William S. Littlepage of the first part, and Cyrus Walker, Samuel B. Keenan, Edward Fife, Thomas Welch, Calvin P. Hogshead and George Rapp of the second part, which was duly acknowledged and recorded ; in which it was recited, that Littlepage had before agreed that if the other parties would, at their joint expense, sink a well on his lot south of the turnpike, the other parties, as also Littlepage himself, might have free access to the well, themselves, their heirs and assigns ; and in pursuance of the agreement the other parties had dug the well : And then, by the covenant, Littlepage bound himself, his heirs and assigns, to and with the other parties, that they, their heirs and assigns, should then and forever have free access to the well ; to have and to take at all times and upon all occasions water from the well whenever they or their servants might want it, and that no obstruction whatever should be made to them, their heirs, executors, administrators or assigns, going to, procuring water and returning from the well, as they might see fit or necessary : And Littlepage on his part, and the other parties, on their part, promised and agreed that the repairing, preserving and keeping in good order, of the well mentioned, should be borne jointly, between them, and each should bear an equal share of the expenses : And, after the signatures and seals, it was stated that it was understood and agreed between the parties, that no individual of them should sell or dispose of his interest in the well, unless he should, at the same time, sell, dispose of and convey the real estate he then owned and was possessed of. with his right title and interest in the well: And it was further understood

by the parties to the contract, that a direct, free opening being made from the turnpike to the well, by Littlepage, then all progress through his lot in any other way was prohibited; and the way to the well should be that designated, from the turnpike. This deed was acknowledged and admitted to record in the office of the court of the county of Greenbrier, in which the lots were situated.

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With the bill, as a part of it, a copy of the deed and certificate of recordation was exhibited.

The plaintiffs allege that all the parties to the contract owned lots adjoining or near each other; that all the original owners sold and conveyed away their respective lots referred to in the agreement; and that—as the plaintiffs maintain—the parties to the contract sold, with their lots, their privilege to use the well; and that it was intended that it should be kept not only for their joint accominodation, but that their respective rights should inure to the benefit of their vendees and assigns forever:

That Church is the owner and occupant of the lot owned at the time of contract by Rapp: That the plaintiff Mrs. Warren, is the owner, through the instrumentality of a trustee, Beard, of the lot then owned by Hogshead; and that Samuel A. M. Syme is the owner of a part of the lot then owned by Littlepage, though not of the part where the well is situated; that the latter part belongs to Mark L. Spotts, who does not object to the use of the water; that Dickson owns the Walker lot, and that Johnson, Spotts and Mrs. Leonard, each, own one of the lots—but what lots, is not stated: That all the original owners have conveyed away their respective lots, and most of the vendees have other sources from which they obtain water, except the plaintiffs and Syme and his tenant:

That the well has hitherto been kept up at joint expense, and is of immense value and importance to the plaintiffs: That recently Syme has locked up the well and forbidden the plaintiff to use the water.

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The plaintiffs pray that Syme, Dickson, Johnson, Spotts, and Mrs. Leonard be made defendants, and be required to answer the bill fully; that Syme be enjoined and inhibited from obstructing or hindering the plaintiffs, their families, or servants, or any of the assignees of the lots, from free use of the water; and that such order may be made in regard thereto, as will secure them, in future, in their rights before mentioned; and that they may have such other and further relief as comports with equity.

The bill was sworn to.

In vacation, by a judge of a circuit court, an order was made, that, upon the plaintiffs or some one of them giving bond as required, and injunction be awarded according to the prayer of the bill, till the respective rights of the parties could be considered and adjusted; and until then, the plaintiffs were declared at liberty to make use of the well and water, as before.

In October, the bill was filed in the circuit court for the county of Greenbrier; and the bond was given, and a summons, with the injunction endorsed, issued.

Proceedings were had in vacation and in term, that need not be set forth.

In December, 1869, by consent of the parties, it was ordered that the name of Church should be stricken out, and the case proceed in the name of Warren and wife.

The defendant Syme answered the bill, saying :

That he is the owner of the lot now occupied by Mays, and claims the exclusive right to the use of the water in the well, and the title to the land on which it is situated; that his father, from whom he purchased, has been in the quiet, undisputed, notorious, adverse, and exclusive possession, control and use of the well, under a title, for the past twenty-five years, without ouster or claim of right, title or privilege, from any one, until the last year, when the plaintiffs, after repeated acts of trespass, set up a pretended right to use the water :

The respondent denies that either of the plaintiffs has

any title to the lots which they occupy ; and alleges that the title to the lot occupied by Warren is in Beard, who has not been made a party to the suit : The respondent denies that the part of the lot occupied by the plaintiff's dwelling house ever was owned or occupied by any of the parties to the original agreement : And the respondent denies that the well has been kept up at joint expense, but, on the contrary, he avers that, for the past twenty-five years, his father and himself have, at their own expense, kept the well in repair ; and that no one, during that time, ever offered to contribute anything towards the repairs ; and, therefore, that if the plaintiffs or their vendors, ever had the right to use water from the well, they have forfeited the same by non-use and failure to contribute to the repairing, preserving and keeping in good order of the well, as stipulated : And he denies that Mark L. Spotts is the owner of the lot on which the well is located : And he finally denies every allegation in the bill not expressly admitted or conceded. The answer was sworn to.

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The plaintiffs replied generally.

In the transcript of the record, as certified by the clerk, are copies of a deed, dated in 1839, from Calvin P. Hogshead to Jas. Nevins : A deed, dated in 1843, from Jas. Points, reciting that at a District Court of the United States for the Western District of Virginia, in October, 1842, upon the petition of Nevins, by a decree of the Court, he was declared a bankrupt, and it was ordered that Points, the assignee, should sell the interest of Nevins in the real estate, and report his proceedings to the court ; and that in December, 1842, he did sell the estate, and Henry Erskine and Mason Mathews became the purchasers ; and purporting to convey the estate to Erskine and Mathews : A deed, dated in 1846, from them to Thomas A. Henning : A deed, dated in 1854, from him to George Lewis : A deed, dated in 1856, between a number of persons—among them Uriah N.

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Warren and Mary Ann, his wife—reciting that George Lewis, in his lifetime, was seised of a number of tracts of land specified, and that he died leaving most of the parties to the deed—among them Mrs. Warren—his heirs; and, to the intent that partition should be made between them, declaring that they should, severally, hold their respective parts—that, as the others, Warren and his wife should have their part, as specified: A deed, dated in 1858, from Warren to William Page, trustee, to secure debts: And a deed, dated in 1866, from John Lipps and John T. Truslow to S. C. Beard, trustee for Mary Ann Warren and her heirs.

It seems, that in the deed from Hogshead to Nevins, the deed from Points to Erskine and Mathews, and, probably, in the deed from them to Henning, and in the assignment in the partition to Warren and his wife, the same lot, in whole or in part, is described—situated in the town of Lewisburg, on the northward side of the turnpike, eastward of a lot of Mrs. Spotts, and westward of a lot of Jacob Smith: But that in the deed from Warren to Page, mentioned, and in the deed from Lipps and Truslow to Beard, trustee for Mrs. Warren, a different lot is mentioned.

Depositions of a number of witnesses are filed, in which they testify as follows: Henning states that Warren's house stands, in part, on the lot bought by him from Erskine and Mathews: That they bought from Points, assignee in bankruptcy, of Nevins, who bought of Hogshead: Spotts states that the lot on which the well is located, originally belonged to Littlepage, and was conveyed by him to Keenan or Wilson, and by one of them to Charles A. Stuart, and by the executors of Mrs. Stuart, to the witness Spotts, without any reservation: That he has lived in full view of the well since 1859, and from that time till a few weeks since, there was always an open way of ingress and egress from the turnpike to the well, across which there was no fence: That he presumes the taxes on the lot were paid by those

under whom he claims, previous to the purchase, and since that time, he has paid them: And William H. Syme states, that he purchased and took possession of the house and lot now in possession of his son S. A. M. Syme, the defendant, in the year 1840, and continued its owner and occupant 'till the past year, when he sold it to his son; except that for a short time during the war it was occupied by a tenant: That when he took possession of the lot and well as appurtenant to it, the well was in a waste condition and unfit for use, and apparently had been in that condition for some time: That, at his own expense, he had it cleaned out, fitted up and repaired; and from that time till he left the property, last year, it was kept in repair by himself and his son and he, witness, himself or by his tenants, continued to use it, uninterruptedly, as his own exclusive property; though it afforded him pleasure, when the water was sufficient, to permit the neighbors to get water there; but, as a matter of right, he does not remember that the privilege to use the water was claimed by any one, and particularly by the plaintiffs: That, during the period of twenty-eight years, Mrs. Leonard, Mr. Jacob Smith, who owned the lots now occupied by the plaintiff Warren, and Mr. James H. Nesmith and Doctor Hugh Wilson, who occupied the property now owned by Spotts, all voluntarily relinquished any right they might be supposed to have to the well in controversy: That the witness claimed the well by reason of his keeping it in repair during the period he owned the property, having had the exclusive use and occupancy during that period; and not by virtue of the contract: That the plaintiff Warren was in the habit of getting water from Mr. Nesmith's well; that when excluded from that, and not till then, he endeavored with or without permission, to get water from the well in controversy, but never claiming the right to get it: That during this time witness frequently locked the well, and his right to do so was never questioned by the plaintiff Warren or any one else; that he

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thinks he first locked it about three years ago: That during his occupancy the well was never fenced up: That he did not own the land on which it is situated: That two of the parties who relinquished the right to it, had wells of their own: That the relinquishment was voluntary: That the witness claimed the property on the land, the well, and the entrance to it, by reason of exclusive use and occupancy for twenty-eight years.

The cause came on to be heard on the bill, answer of some of the defendants, replication, service of summons on other defendants, exhibits, and depositions, and was argued by counsel: Whereupon, it was adjudged, ordered and decreed, that the defendant Syme be required to remove the obstructions to the well, so as to afford to the plaintiffs and their families direct and convenient access to it, in the same way that they enjoyed it before the obstruction was interposed by the defendant, or in some way equally convenient and direct; and that the plaintiffs should so have convenient and uninterrupted access to the water at all times, without let or hindrance, unless otherwise ordered by the court: And if the obstruction should not be so removed, the sheriff of the county, upon the application of the plaintiffs, should remove the obstruction and afford such access, at the cost of the defendant Syme, and should summon any force that might be necessary to enable him to execute the decree; and the injunction before awarded should be continued: And, that an account should be taken by a special commissioner, to ascertain and report the amount of expense incurred by Syme and his vendor, or those claiming under him, in keeping the well in repair and fit for use, and the amount paid by the plaintiffs; with any other matters deemed pertinent by himself or required by either of the parties.

Before the commissioner, Dickson, Spotts and Johnson were examined as witnesses, and testified that they did not use the water from the well, and had no interest in the suit: Other witnesses testified that William H.

Syme repaired the well. Accordingly, it was reported, by the commissioner, that from 1840 to 1868, William H. Syme kept the well in repair, at an aggregate expense, which, with interest, amounts to \$262.92. The plaintiffs excepted to the report, because, as they stated, the defendant never made any charge against the plaintiffs, or any owners of the well; and, in a suit to restrain the defendant from obstructing the plaintiff from the use of the well, the court ought not to adjust matters which had nothing to do with the subject.

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In April, 1871, the cause came on again to be heard upon the papers before read, and report of the Commissioner, and was argued by counsel; on consideration whereof, it was decreed, that the bill be dismissed, and that the defendant Syme recover against the plaintiffs his costs.

At the January term of this court in 1873, an appeal was allowed, and bond given.

It is alleged in the bill, substantially, though not at all formally, that the right to take water from the well was appurtenant to the Hogshead lot, and that the plaintiff Mrs. Warren owned the lot.

The agreement made by Littlepage with Hogshead, Rapp and others, respectively, is not in form a grant of the right to take water from the well, but it is a deed, by which a previous agreement was recited, and the owner of the lot on which the well is situated bound himself, his heirs and assigns, that the other parties, their heirs and assigns, should forever have access to the well, to have and take, at all times, water from it, when they might see fit: And the parties agreed that each should pay an equal part of the expense of repairing the well: And, in the superadded paragraph, it is recognized that each of the parties, by operation of the deed, took an interest that he might dispose of, subject to the qualification prescribed. The deed does not indicate that the parties contemplated any further assurance. I think the deed



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There is no express declaration in the deed, that the right granted shall pertain to the lots owned, severally, by Hogshead and others, now claimed by the plaintiffs and others, or to any other lots or lands: But, assuming for the purpose of construction, that the lot owned by Hogshead at the time of the contract between Littlepage and him and others, is the same now claimed by the plaintiffs; there is evidence tending to prove that the well is so near to the lots mentioned that it might, by the occupants of these lots, be conveniently used; while it would probably be of little if any value to any other person. With reference to these facts, if true, I think the provision that neither of the parties taking the easement should dispose of it, unless at the same time he should dispose of the property which he owned, with his right to use the well, by implication, annexed the servitude to the respective lots, as an easement appurtenant to each.

But it is argued by counsel that the deed is not in itself certain as to the lot upon which the servitude was imposed, or those to which it was annexed; and that therefore the recordation is ineffectual, and the deed is void as to Syme. And the case of *Mundy v. Vawter*, and the other cases considered with it as one case, (3 Gratt., 518) is relied on as authority for the objection.

The deed describes the well as on the lot of Littlepage, south of the turnpike, east of the lot belonging to Samuel B. Keenan, adjoining his lot. It would seem probable that there would be no difficulty in finding the lot described. And it would naturally occur to any one that the servitude was created and intended to be used in connection with adjacent lots. The deed itself recognizes that Hogshead and the other parties owned the lot with which the water was to be used, and, as has been before observed, the evidence in the case indicates their proximity to the well. Syme or any one

else, about to purchase from Littlepage, had access to the deed books as well as other ordinary fields of information, from which to ascertain the creation of the servitude, the identity of the lot on which it was imposed, and the lots to which it was made to pertain. A subsequent purchaser might refer, not only to the deeds or record of the deeds for these lots, and the objects to which they related, but to the deeds and objects indicating the location and limits of other lots that determined or tended to determine the location and limits of those in question. The index to the deed books afforded the ordinary clue to the investigation.

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Intrinsic certainty in a deed relative to specific property is simply impossible. The description can be made certain only by proof or recognition of the identity of the subjects to which it refers, or other objects or things that, more or less directly and distinctly, indicate and determine it. And, in the application of deeds and other documents to lands and lots, extensive latitude is allowed for the discovery and proof, not only of visible monuments or objects mentioned, but of mathematical lines of other lands and lots, and various classes of facts to which the description or suggestions in the deed may apply.

As, in this case, the deed of grant was sufficiently certain, and properly admitted to record, it was effectual to create and dispose of the right, as to all persons.

The certainty of a deed is determined by the principles of the common law. The recordation is regulated by the statutes alone.

By the act of the General Assembly, on the subject, passed in 1705, (3 Hen. St. p. 318-19,) it was declared that no lands, tenements or other hereditaments should pass, whereby an estate in fee or for life should take effect in any person, unless the same should be made by writing, indented, sealed, and recorded as and within the time specified.

By the act passed in 1734, (4 Hen. St. p. 398-99,) it was provided, that all bargains, sales and other conveyances of any lands, tenements and hereditaments, for

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passing an estate of freehold or inheritance, or for a term of years, should be void as to all creditors and subsequent purchasers, unless they should be acknowledged or proved and recorded according to the directions of the act.

By the act of 1785, which took effect in 1787, (12 Hen. St. p. 154,) it was provided, that no estate of inheritance or freehold, or for a term of more than five years, in lands or tenements, should be conveyed from one to another, unless the conveyance should be declared by writing, sealed and delivered; nor should such conveyance be good against a purchaser for valuable consideration, not having notice thereof, or any creditor, unless the writing should be acknowledged or proved and lodged, as prescribed, within the period prescribed.

At the revisal in 1819, (1 R. C. p 361, ch. 99, s. 1,) this provision was re-enacted:

And the provision enacted in 1734, already recited, was re-enacted with slight modifications, (p. 362, s. 4,) so as to provide, that all bargains, sales and other conveyances of any lands, tenements or hereditaments, made for passing any estate of freehold or inheritance, or for a term of years, should be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they should be acknowledged or proved, and lodged with the clerk to be recorded, according to the directions of the act; but that such deeds, as between the parties and their heirs, and as to all subsequent purchasers with notice thereof, or without valuable consideration, should, nevertheless, be valid and binding:

And, by another section, (p. 364, s. 12,) then first enacted, it was declared, that every conveyance, covenant, agreement and other deed, in the act mentioned, (except deeds of trust and mortgages,) which should be acknowledged, proved or certified according to law, and delivered to the clerk of the proper court to be recorded, within eight months after the sealing and delivery,

should be valid as to all persons, from the time of such sealing and delivery.

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Under the law before the year 1819, it was plain, that, when the deed was recorded it was as valid and effectual as to all persons, as if there had been no legislation requiring recordation. But, if before that time there had been doubt on the subject, by the provision last recited, the validity of the deed, when recorded, was declared in language so clear that explanation would tend rather to obscure than to illustrate the subject.

Whenever the holder of the legal title to land made a deed for the conveyance of an estate, or the creation of a servitude or easement upon it, that was valid and effectual as to the alienor, the deed, when duly admitted to record, became alike valid and effectual to pass the estate or create the servitude or easement, as to any subsequent purchaser from him for valuable consideration without notice, and as to all other persons: Though, according to the more prevalent opinion, if the owner of a mere equitable right, separated from the legal estate, made a deed for the land, without warranty, to one person, and afterwards obtained the legal title and made another deed for it, to another person, for a valuable consideration without actual notice, notwithstanding the deed was recorded, this was not, by construction, such notice as to affect the conscience of a subsequent purchaser for valuable consideration—and would not prevent the purchase of the legal estate from extinguishing the equitable right unknown to the subsequent purchaser.

The case of *Mundy v. Vawter*, with the other cases decided with it, is voluminous, and the facts involved are complicated. The facts, however, referred to in that part of the opinion of the court supposed by counsel to be material in this case, are these:

While the law of primogeniture prevailed, George Christian, having the legal, as well as the equitable estate, in a tract of two hundred and fifty-three acres of land, an-

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other of two hundred and fifty acres, and another of four hundred acres, and the mere equitable right to a tract of one thousand and thirty-six acres, died intestate, and the whole descended to James Christian his oldest son. He and Charles Christian, his brother, and Elizabeth Christian and Sallie Christian, his sisters, supposing they all inherited the estate of their father equally, jointly obtained the legal title to the larger tract. In 1805, James Christian conveyed to Stephen Watts and James Murphy, trustees, all his estate real and personal—without specification of the tracts of which it consisted—that out of the rents, issues and profits, they might pay his debts and maintain and support his wife, and provide for the support and education of his children during his life, and at his death divide and convey the estate with the profits, one-third to his wife and the residue to his children. The deed was admitted to record. In 1807, James Christian, and Charles Christian, and James Murphy who had married Elizabeth Christian, and she, and William Horsley who had married Sally Christian, and she, and Watts and Murphy the trustees—though the latter had no authority to sell—made a deed of conveyance to James Dillard, in consideration of \$1,314, which was paid. During this transaction, neither James Christian, nor Watts and Murphy, the trustees for the beneficiaries in the deed made in 1805, claimed more than an undivided fourth of the land, and Dillard had no notice of the equitable right in the beneficiaries to more than such interest. On the contrary, James Christian and the trustees claimed but a joint interest with Charles Christian; and they and Mr. and Mrs. Murphy and Mr. and Mrs. Horsley made the sale jointly; and neither James Christian nor the trustees objected to Dillard's paying three-fourths of the purchase money to Charles Christian and to Mr. and Mrs. Murphy and Mr. and Mrs. Horsley, in equal proportions,—which he did; so that from the conduct of James Christian and the trustees themselves, Dillard had good

reason to believe—and as the court held—did believe, that the interest of James Christian at the date of the deed did not in any respect extend to the entire estate, exclusive of the title of the other parties to three-fourths of the land—but that it extended only to one-fourth.

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Accordingly, the court held, that only to the extent of the undivided fourth part of the land, the legal title to which, by the deed executed in 1805 passed from James Christian to Watts and Murphy the trustees, for the benefit of the parties provided for, Dillard was a purchaser with notice of the right of the beneficiaries: But that, as to the three-fourths of the land the title to which passed from Charles Christian and Mr. and Mrs. Murphy in her right, and Mr. and Mrs. Horsley in her right, to Dillard, he was a purchaser for valuable consideration, and had no notice of the equitable right of James Christian; and that notwithstanding such right, on the familiar principle of equity applicable to the subject, Dillard took the complete legal title, discharged of the latent right. The deed from James Christian to Watts and Murphy, trustees for others, though for all Christian's estate, without specification of the parts, so far as the deed passed the legal title from each of the cotenants to the purchaser, was valid against the grantors and all other persons; but, according to the decision, was not notice to the subsequent purchaser of the equitable right in one party, separated from the legal title vested in another party which passed from him to the purchaser.

A person who would purchase a tract of land or a lot from another, naturally ascertains, from the record or otherwise, or assumes, that the party from whom he would purchase, has title to the land; and seeks to ascertain whether he has disposed of the title, or retains it. When the owner has made a deed, which is recorded, if the subsequent purchaser fails to examine the deed books, however special the description of the property may be, the record affords him no information. If, however, he does examine the books, the same search

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will lead to a deed which merely mentions all the alienor's estate, that would lead to one which specially describes the property in question ; and upon inspection of the deed containing only such general description, it would be as clearly and simply manifest that the holder of the specific property had conveyed it, as if it had been particularly described.

Though what I have stated is the extent of the actual decision in *Mundy v. Vawter*, and the other cases considered with it, as far as it relates to this subject, the court in that case, says :

"The court is of opinion that the deed of the 17th of June 1805, executed by the said James Christian to Stephen Watts and James Murphy, conveying to them, as trustees, for the purposes therein mentioned, 'all the estate both real and personal, to which the said James was in any manner entitled at law or in equity,' notwithstanding its want of designation and description of the lands of said James intended to be conveyed, was good and valid between the parties, and embraced the rights of said James in the tract of one thousand and thirty-six acres, and the three adjoining tracts aforesaid, acquired by descent, from the said George Christian his father.

"But the court is further of the opinion, that the registry of the deed just mentioned was not, because of the want of designation and description of the lands intended to be conveyed, notice in point of law to a subsequent purchaser from the grantor, of the existence of said deed ; nor would notice in point of fact of such existence and contents affect such purchaser, unless he had further notice that the land purchased by him was embraced by the provisions of said deed ; and the proof of such notice, whether direct and positive, or circumstantial and presumptive, must be such as to affect the conscience of the purchaser, and is not sufficient if it merely puts him upon inquiry, but must be so strong and clear as to fix upon him the imputation of *mala fides*."

I have thought and reflected long and carefully on this subject; and though, with my sincere confidence in their wisdom and earnestness, I hesitate to attribute to the eminent judges who decided that case, either error of judgment or negligence in expression, I am, nevertheless, constrained to declare my irresistible conviction, that, beyond the principle involved in that case—which is not controverted—the latter paragraph, just quoted, is not law.

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In deeds for all classes of property, descriptions of the most general character, that, by reference to existing facts may be made certain, prevail extensively. Under the plain language of the statute, and the uniform opinion of jurists—as far as I am informed—(except that of the judges who decided the case just mentioned, as indicated by the passage quoted,) such deeds have been employed, and, when recorded, have been treated as valid, and have been held to be effectual to pass the legal estate vested in the alienor, against all persons. And, with undoubting confidence in their validity and efficacy, titles have been acquired, and are held and deemed secure. Now to hold and declare that such deeds are void as to creditors and subsequent purchasers for value without notice, would disturb the quiet and destroy the security of titles and rights, to an extent beyond the scope of foresight: And, especially, to hold such deeds conveying real estate to trustees to secure debts, though recorded, nevertheless void as to other creditors or subsequent purchasers, (whether the trustees have sold and others have purchased and paid for the estates or not,) would subvert the efficacy of recorded deeds, with most disastrous results.

But the defendant Syme does not allege that he or Spotts, or any other person, purchased from Littlepage, mediately or immediately, for a valuable consideration, without notice of the creation and annexation of the easement;—as he should do, in some form, if he would rely on such fact.



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Though the copies of the deeds from Hogshead to Nevins, from Points to Erskine and Mathews, from them to Henning, and from him to Lewis, and the deed of partition between other persons and the plaintiffs, are not specified in the bill or order book as exhibits, and—as far as appears here—were not endorsed as such, they are in the transcript of the record, certified by the clerk of the circuit court, and must be regarded as exhibits recited in the decree, as read on the hearing. The clerk, under the supervision of the court, must ascertain the papers filed in the case or referred to in the order book, as a part of the record: Though when the papers are identified, whether they may be considered as properly a part of the record, the court decides.

But there is no sufficient evidence to prove the identity of the lot owned by Hogshead at the time of the grant of the easement, with the lot mentioned in the deed: And there is no evidence competent to be used against the defendants that Nevins was, by the United States District Court, declared to be a bankrupt; that Points was assignee; or that he was by the court ordered to sell Nevins' property. Unquestionably, the mere recital, by Points, that there were matters of record that conferred on and vested in him title and power to sell, is not proof of such fact, against a person claiming to have right otherwise than through or under him: And there is no evidence competent against the defendants, that Lewis died, or that the plaintiff, Mrs. Warren, or either of the other parties to the partition, was his heir.

The copies of the deeds filed, then, did not prove that the title to the lot owned by Hogshead, passed from him to the plaintiffs.

In connection with the deeds, the testimony of Henning, who speaks of Points as assignee in bankruptcy of Nevins, and states that he owned the lot, to some extent indicates that the title of Nevins passed by the deed from Points to Erskine and Mathews: And no exception to the testimony appears. But, in a case such as this, and

generally, parol evidence is not competent to prove the contents or effect of a deed ; and the mere failure to object to such testimony when offered, or except to it afterwards, does not make it adequate to prove such fact.

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Though the testimony of the same witness affirms that the house occupied by Warren is in part on the same lot, it does not assert or imply that the title passed from Henning to him or his wife.

The defendant Syme is not subject to any privity with the plaintiffs, or in any manner estopped to question their right. He denies that the plaintiffs had any title to the lot they occupy, and they prove none. They can have no relief in this case.

But, as the plaintiffs seem to have supposed the evidence adduced, complete to prove that the title to the lot passed from Hogshead mediately to them, and, upon that hypothesis, the pleading and evidence evolve several questions deemed material to the rights of the parties, it may not be improper to consider these briefly.

In each of the deeds from Hogshead to Nevins, from Erskine and Mathews to Henning, and from him to Lewis, there is express reference to "appurtenances ;" but, in the deed from Points to Erskine and Mathews, there is no mention of the right to use the well, or of any appurtenance to the lot.

If, however, Nevins was declared a bankrupt and Points was assignee, then, by operation of law, all the property of the former, of every nature, was vested in the latter, to sell for the benefit of creditors. But it was a condition to which the easement was subject, that Hogshead should not sell or dispose of it separately from the lot. Such a condition, in effect merely annexing the servitude upon one estate to another estate, was not such a restraint on alienation as to be objectionable. And the easement remained subject to this qualification, after it was vested in the assignee in bankruptcy: So that, while it was his duty to sell the easement, he could not

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dispose of that separately from the lot. Under these circumstances, the conveyance of the lot by the assignee in bankruptcy would imply the transfer of the easement appurtenant, without an express grant or any mention of the appurtenance—Notwithstanding it does not appear that the use of the water was necessary to the enjoyment of the lot, or that at the time of the conveyance the easement was, in fact, used with the lot.

Then, if upon the death of Lewis, and the partition of his estate, the plaintiffs acquired the title to the lot, they acquired, with it, the right to use the well.

There is no evidence that the plaintiffs ever did anything indicating a relinquishment or abandonment of the right to use the well with the lot, except, that, from the time when they acquired the right, they did not use it till about two years before the institution of the suit;—when they endeavored to get water from the well, though not claiming the right to do so; and, afterwards, Syme locked the well, and his right to do so was not questioned. But the recital in the deed of partition, indicates that Lewis was living in 1854, and the title to the Hogshead lot or any interest in it, could not have descended on Mrs. Warren till afterwards. From that time till the institution of the suit, she was a married woman:—Though perhaps her husband so acquired her estate and its appurtenances for their joint lives, that it might be affected for that period, without regard to her disability.

There is no evidence that Littlepage or any person claiming the lot on which the well is situated, or any person deriving title from him, ever used or claimed the right to use the well, adversely to the right of the plaintiffs.

Though, in the deed between Littlepage of the one part and Hogshead and others of the other part, it is recited that Littlepage agreed, that if they would sink the well, they and their heirs and assigns might have access to it, as also Littlepage and his heirs and assigns; the latter

clause seems to be added to preclude any presumption, that might arise, that the use of the well by the other parties should be exclusive of the like use by Littlepage or his heirs or assigns, who should own the corporeal estate in the well. But this clause did not create any new right in Littlepage or any purchaser from him, that otherwise he would not have had, or annex any servitude on the well, or attach any right to the use of it, to any other part of the lot.

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There is no evidence that Littlepage ever used the well in connection with that part of the lot which, it is said, he sold and Syme purchased; or that the right to use the well was necessary to the enjoyment of that part; or, that such servitude ever became appurtenant to any part of the lot, or in any way passed from Littlepage to either Syme.

The elder Syme, the witness, says, that he purchased and took possession of the lot now in possession of his son, the defendant; that he did not own the lot on which the well is situated, but took possession of the well as appurtenant to the other lot; and that he had the well repaired at his own expense, and used it without interruption, as his exclusive property, for many years. Upon elementary principles and authority, the incorporeal right to use the well, alone—not the estate in the land—could be appurtenant to the lot claimed by Syme. And he may have so used the well, with the acquiescence of the owner, as to establish a right to use it as such easement. But there is no sufficient evidence that he did any act exclusive of the plaintiffs from the use of the water in common with himself, or any act demonstrative of an adverse claim known to the plaintiffs, or which, with ordinary attention, they would have learned, till a short time before the institution of the suit: Or that, upon any acts or acquiescence of the plaintiffs unequivocally significant of abandonment, the defendant Syme purchased the lot.

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When, by direct proof of a grant, or other sufficient evidence, an easement has been conclusively established, there may be proof of an act or declaration of the owner indicative of renunciation or abandonment, followed by non-use for a period long enough to bar an action of ejectment to recover the possession of the land; which, when the defendant is not under disability, is ten years, and when he or she is under disability, is twenty years: Or proof of a claim by the owner of the corporeal estate, or another in his stead, known to the owner of the easement, or evinced by acts that, in the exercise of ordinary vigilance he would have learned, followed by non-use by the owner, for such period: Or an act or declaration by the owner of the easement, clearly demonstrative of actual abandonment, that in fact promotes some action on the part of another, by which, if the easement were not held to be determined, the latter would be seriously injured: And such proof may conclude the extinguishment of the easement. But certainly, nothing less than one or the other of these combinations of facts, will have such effect. The limited right of a husband in the inheritance of his wife, may, by such acts and declarations, be affected for the time of its duration, as the right of other owners would be: But whether the right of a married woman, would, by such acts and non-use for twenty years, be extinguished, I do not now pause to consider.

The plaintiffs, in the bill, allege that the defendant Syme has recently locked up the well, and forbidden them to use the water. The defendant Syme, in his answer, does not admit or concede this, in whole or in part; and he denies every allegation of the bill not expressly admitted or conceded. There is no proof that this or any other defendant at any time either locked the well or forbade the plaintiffs to use it, or in any manner prevented their enjoyment of the water it furnished.

The provision adopted in the Code of this state, (Code

p. 604, Ch. 125, s. 36,) that every material allegation of a bill not controverted by the answer, shall, for the purposes of the suit, be taken as true, does not require a more special denial than was sufficient before its adoption. But, as formerly, the plaintiff, upon proper allegations, may interrogate the defendant, and he will be required to answer each proper interrogatory. Under other provisions of the statute, when the plaintiff swears to his bill the defendant is justly required to swear to his answer, in order that the plaintiff who so verifies his case shall not be put to the trouble and expense of further proof, unless the defendant will, in like manner, verify his defense: But it is provided—as I think wisely—that neither the bill nor the answer, whether both or neither be so verified, shall be read as evidence upon the final hearing of the cause. If the defendant does not answer properly, the plaintiff may except to the answer. When, however, he fails to do so, a general denial of the allegations of the bill, or any of them, will make it necessary that the plaintiff shall prove the facts alleged and so controverted, that are in their nature affirmative.

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The decree of the circuit court rendered in December 1869, directed that the plaintiff should have uninterrupted access to the water of the well, unless and until otherwise ordered by the court; that the injunction before awarded,—which was only until the rights of the complainants could be considered and adjudicated—should be continued; and that an account should be taken by a commissioner named, to ascertain the amount of expense incurred by Syme the father, from whom Syme the defendant claimed, and by the latter, in keeping the well in repair, and the amount paid by the plaintiffs; and that the account when taken should be reported. The rights of the parties were not finally adjudicated; the injunction was not perpetuated; the decree directed an account to be taken and reported; while it did not determine the question of costs or direct their payment.

The decree was merely interlocutory.

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The final decree rendered in 1871, from which the appeal was taken, properly, in effect terminated the operation of the interlocutory decree and dissolved the injunction.

The plaintiffs, in the bill, allege nothing that is sufficient cause to make Dickson, Johnson, Spotts and Mrs. Leonard parties ; and do not seek relief or prove right to it against any of them. Though the plaintiffs named them as defendants and ask that they should be required to answer the bill, they did not appear as parties. The plaintiffs took no decree *nisi* or other order against them ; but brought the case to a hearing, or acquiesced in the hearing ; when the bill was dismissed generally. If it really appeared who severally have the right to enjoy the well in common, the plaintiffs could not object that the case was not matured as to the parties mentioned, or that the court did not provide for the payment to Syme of any part of the expense of repairing the well : And the plaintiffs, only, appeal and no other party asks a reversal.

As the plaintiffs failed to prove that they had the title which they claimed to have acquired mediately from Hogshhead, or the right to use water from the well annexed to it, or any right whatever to use the well ; or, if they had such right, failed to prove that the defendant Syme, or any party to the suit obstructed it ; the decree dismissing the bill was unquestionably right, and must be affirmed, with damages and costs to the defendant against the plaintiffs.

The other Judges concurred.

DECREE AFFIRMED.

**CASES DETERMINED**  
 IN THE  
**SUPREME COURT OF APPEALS**  
 OF WEST VIRGINIA,  
 AT THE JUNE TERM THEREOF, HELD AT WHEELING, IN  
 THE COUNTY OF OHIO, COMMENCING ON THE  
 THIRD DAY OF JUNE, 1874, AND END-  
 ING ON THE TWENTY-FIRST  
 DAY OF JULY, 1874.

|     |     |
|-----|-----|
| 7   | 501 |
| 34  | 368 |
| 7   | 501 |
| 35  | 613 |
| 36  | 300 |
| 7   | 501 |
| 38  | 107 |
| 7   | 501 |
| 43  | 96  |
| 43  | 106 |
| 7   | 501 |
| 50  | 441 |
| 7   | 501 |
| 50  | 692 |
| 7   | 501 |
| 164 | 378 |

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**LIST v. CITY OF WHEELING.**

July 13, 1874.

By an act of the Legislature, passed the 13th day of February, 1872, entitled, "An act to authorize the City of Wheeling to subscribe to the capital stock of the Wheeling and Lake Erie Railroad Company," the Council of the City of Wheeling were authorized to subscribe, in the name of the City, to the capital stock of said Company, to an amount not exceeding \$300,000.00, and pay the same in the bonds of the City, *provided*, not less than three-fifths of the voters of the City, who voted on the question, were in favor of the same. By an act of the Legislature, passed February 15, 1872, entitled, "An act to incorporate the Wheeling and Ohio Union Railroad Company," and the thirteenth section thereof, the Council of said City, was authorized to subscribe, in the name and on behalf of the City, to the capital of said Company, to an amount not exceeding \$500,000.00, and might pay the subscription in the bonds of the City, or

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otherwise, *provided*, three-fifths of the voters of said City, voting on the question, voted for the subscription. Each of said acts authorized the Council of the City to submit to the voters, by an election, the question of the subscriptions. The Council, by two separate ordinances, submitted to the people the question of \$300,000.00 subscription, under each act, the election to take place on the 1st day of June, 1872. On that day the election was duly held, and three-fifths of the voters of the City, voting at the election, voted in favor of each subscription. Afterward, on the 22d day of August, 1872, the people of the State adopted a new Constitution, which took effect on that day, by express provision of the Schedule thereto. The eighth section of the tenth article of the Constitution, so adopted, is in these words, viz: "No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall, hereafter, be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding, thirty-four years: *provided*, That no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same." After the adoption of the new constitution, and after it had taken effect, and on the 20th day of January, 1873, the Council of the City, by two separate ordinances, appointed three commissioners, (the same in each case,) to subscribe to the stock of each of said Companies, the said sum of \$300,000.00, to be paid in the bonds of the City, and directing when such bonds should be paid by said commissioners. In each case the bonds to be payable in the City of New York, bearing seven per cent. interest, payable semi-annually, and the principal payable in thirty years. The Council failed to provide for the collection of a direct annual tax sufficient to pay, annually, the interest on the debt to be created by such subscription, or any part thereof. It is admitted that the subscription of both of said sums of \$300,000.00, or either of them, would increase the debt of the City beyond the limit prescribed by the said eighth section of the tenth article of the Constitution. The making of each of said subscriptions were, by the Council, made subject to conditions. Before either of the subscriptions to the stock of said Companies were made, H. K. L., and others, resident voters, owners of property and tax-payers in said City, who sued in their own behalf as well as all other tax-payers of the City, except the defendants, filed in the circuit court of the county of Ohio, their bill of injunction against the said City, the members of the Council and said Commissioners,

enjoining and restraining them from subscribing to the stock of said Companies, or either of them, the amounts aforesaid, payable in the bonds of the City, or any part thereof, or to contract a debt therefor, or any part thereof.—HELD:

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1. That the provisions of said acts of the Legislature, authorizing the Council of the City to subscribe stock to each of said Companies, conferred a power upon a public corporation of government which could be modified, changed, enlarged, restrained or repealed by the Constitution—the said acts, in neither case, importing a contract, within the meaning of the clause of the Constitution of the United States, prohibiting a state from passing a law impairing the obligation of contracts.
2. The ordinances submitting said subscriptions to the vote of the voters, and the mere vote of the prescribed number of voters for the subscription, did not, in, and of themselves, together, or separately, form such a contract with the Railroad Companies, as would be protected by the tenth section of the first article of the Constitution of the United States. Until the subscriptions were each made, the contract, in each case, was unexecuted.
3. The said eighth section of the tenth article of the Constitution of the State is not addressed alone to the Legislature, but is addressed to the several counties, cities, &c., and all other departments and persons in the State, and took effect and became binding and operative, so far as it is prohibitory and restrictive in its provisions, upon counties, cities, &c., on, and from the 22d day of August, 1872; and the action of the Council of the City in appointing commissioners to make said subscriptions, payable in the bonds of the City, was, under the circumstances, without authority of law, and for said subscriptions to be made for said amounts and a debt be thereby created therefor, or for any part thereof, payable in the bonds of the City, would be in violation of the said eighth section of the tenth article of the Constitution of the State.
4. Equity, in such case, has jurisdiction to perpetually enjoin the making of the subscriptions and the issuing of the bonds of the City.
5. The third section of the eleventh article of the State Constitution does not qualify or suspend the operation of said eighth section of the tenth article thereof.
6. The final decree, perpetuating the injunction, whereby the court orders and decrees "that the defendants, and each of them be, and they, and each of them, are, hereby, enjoined and restrained from contracting the debts and issuing the bonds in the bill of complainants mentioned, or either of them,

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or any part thereof," should be construed to apply only to the ordinances of the Council of the City authorizing the subscriptions to be made to the stock of said Companies, and the making of the subscriptions for the said amounts, or any part thereof, and payment thereof, or any part thereof, in the bonds of the City, and the making of subscriptions to the stock of said Companies, or either of them, for the said amounts, or any part thereof, in such manner as to create a debt against the City under and according to said ordinances, or either of them. That the said perpetual injunction does not prohibit the City of Wheeling, or its Council, from hereafter contracting any such debt, and issuing the bonds of the City therefor, when done according to the provisions and within the limits, restrictions and requirements of said eighth section of the tenth article of the Constitution, and any act of the Legislature which may then be in force, not in conflict with, or contrariant to, said section and article.

7. The said eighth section of the tenth article of the Constitution was not intended to, and does not in anywise, interfere with, or prevent, the levying, collecting and expenditure, annually, by authority of law, by the proper legal authorities, of the several counties, cities, &c., taxes for county, city, &c., purposes, and to do and cause to be done, whatever is necessary or proper for that purpose, including the making, or causing to be made, contracts touching the expenditure of the taxes so levied and collected annually, and the like—And all this without a vote being taken, under the eighth section of said tenth article of the Constitution.

Appeal by George Baird, Andrew Wilson, John Butterfield, Porter Smith and others, defendants, from a decree of the circuit court of Ohio county, rendered May 7, 1873, perpetuating an injunction, theretofore granted, by the judge of said circuit court.

The complainants below were Henry K. List and a large number of other citizens and tax payers of the city of Wheeling, suing for themselves and on behalf of all the other taxpayers of said city, (except the defendants in the suit,)—and the respondents the said City of Wheeling, the members of the First and Second Branches of the City Council of said City—setting out their names—George W. Jeffers as Mayor of said City, and George Adams, Josiah F. Updegraff and Benjamin Fisher, who had been, theretofore, appointed by said Council, for and on behalf of said city of Wheeling to

make certain subscriptions to "The Wheeling and Lake Erie Railroad Company," and to the "Wheeling and Ohio Union Railroad Company," in accordance with certain conditions set forth in the ordinance appointing them commissioners. The material facts will be found set forth, at length, in the opinion of the Court.

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The Hon. Thayer Melvin, judge of said circuit court, presided at the hearing below.

*C. W. B. Allison* for the appellants.

*Daniel Lamb* and *Asbury J. Clarke* for the appellees.

HAYMOND, PRESIDENT:

This is a bill of injunction in which the circuit court of the county of Ohio perpetuated the injunction. On the 13th day of February, 1872, the Legislature of this State passed an act entitled, "an act to authorize the city of Wheeling to subscribe to the capital stock of the Wheeling and Lake Erie Railroad Company." This act provides that the Council of the City of Wheeling is authorized, and empowered, to subscribe, in the name and on behalf of the City, to the capital stock of a Company authorized to construct a railroad from a point at or near said City, in the county of Belmont in the state of Ohio, to Toledo in the county of Lucas, Ohio, to an amount not exceeding \$300,000, on such terms as they may deem advisable; and such Council may pay such subscription by issuing the bonds of said City or otherwise, and may provide, by taxation or otherwise, for the redemption of such bonds, and payment of interest on the same; that before making such subscription, the Council of the City shall cause a vote to be taken upon the question, at the several places of voting in the City, at any general or special election, ordered by them for that purpose, notice of which shall be published in each daily newspaper in the City, for fifteen days, at least, before the poll is to be taken, at which election all persons having the right to vote for mayor of said City shall be entitled to

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vote. The poll shall thereupon be taken and the result ascertained under the regulations prescribed for city elections. On the ballot used in the poll there may be written or printed thereon the words, "subscription" or "no subscription" or any mode that will show how the voter intends to vote on the question proposed. If it appear by the poll that not less than three-fifths of the voters of the City, who voted upon the question of the proposed subscription, are in favor of the same, the subscription may then be made, to the amount proposed or any less amount; that the right to the stock subscribed for under the preceding sections, or any special act of the Legislature thereafter passed, shall be vested in the City of Wheeling, and the Council thereof shall have authority, from time to time, to appoint a proxy to represent the said stock in the meetings and elections to be held by the stockholders of the Company. The dividends on the stock shall be collected as the city council may order, and paid into the city treasury; but before the subscription authorized by this act shall be made, such Railroad Company shall give a guaranty to the Council of the City that it will construct its road into the City, and make its eastern terminus, and its depot ground and buildings thereon, within the corporate limits of the City east of the east channel of the Ohio river; that the Council of the City of Wheeling is hereby authorized to grant to said Railroad Company, which may construct the road aforesaid, the use of any of the streets and alleys, or public grounds within said City, for its track upon such terms and restrictions as it may prescribe.

On the 15th day of February, 1872, the Legislature passed an act entitled, "an act to incorporate the Wheeling and Ohio Union Railroad Company." The first section of this act provides that Henry K. List and a number of others, therein named, or any three or more of them, and their associates, successors and assigns, and all who shall become stockholders, when one thousand shares of the capital stock of the Company shall

have been subscribed as thereafter provided, and made a body politic, by the name, style and title of the "Wheeling and Ohio Union Railroad Company;" and that said subscription shall be made in good faith, within three years from the passage of this act. The second section of this act authorized the Company to locate, construct and maintain a railroad from some point within the City of Wheeling, across the Ohio river to the State of Ohio, and is also authorized to locate, construct and maintain its road, or any branch thereof, on or over any street or ally within the City of Wheeling, &c., with a proviso not necessary to notice here. The third section of the act grants authority to the Company to erect, construct and maintain a railroad bridge across the Ohio river at any point within said City of Wheeling it may select, &c. The thirteenth section of the act provides that the Council of the City of Wheeling may subscribe in the name and on behalf of the City of Wheeling to the capital of said company, to an amount not exceeding \$500,000.00, and may pay for its subscriptions in the bonds of said City or otherwise: *Provided*, that before any such subscriptions shall be made, the maximum amount thereof shall be fixed, and the question whether such subscriptions shall be made or not, shall be submitted, under suitable regulations, to be prescribed by the Council of said City, to a vote of the persons authorized to vote for members of the Council of said City, and unless three-fifths of the votes cast shall be in favor of making such subscription, the same shall not be made. The fifteenth section of the act provides, among other things, that if the said City of Wheeling shall make such subscription it is authorized and empowered to issue coupon bonds to an amount sufficient to pay for its subscription, payable at such time and place, and at such rate of interest, not exceeding seven per cent., as the Council of the City shall direct; and to secure the payment of the principal and interest of the bonds issued, the said City may cause

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to be executed, in its name and on its behalf, a proper deed of trust on its stock in said Company. There are other sections in this act not necessary to refer to here as they do not bear on the questions involved in the cause.

The first section of an act of the Legislature passed March 1, 1871, provides that any railroad company that may be incorporated by the laws of the State of Ohio, for the construction of a railroad from the City of Wheeling, or from the western bank of the Ohio river, opposite to said City, northwestwardly through the state of Ohio, in the direction of New Philadelphia and Toledo, or other point on or near Lake Erie, shall have power to extend its road across the Ohio river at Wheeling Island, and to bridge either or both branches of the Ohio river to such point within the City of Wheeling, as it may deem advisable. The second section of this act gives to such railroad company the same powers, privileges and franchises, in this State, for the purpose of constructing, maintaining and operating its road in this State, and erecting and maintaining bridges, &c., as are conferred upon the company by the laws of Ohio, and makes the company, as far as the road is in this State, a West Virginia corporation and subject in the exercise of its powers, &c., and to be governed by the general railroad laws of the State. Acts of 1871, 248.

The ninth section of an act of the legislature of the State of Ohio, entitled, "An act to authorize the consolidation of railroad companies of states adjoining, in certain cases, and authorizing railroad companies of this state to extend their roads into adjoining states," provides that any railroad company now organized, or which may hereafter be organized, in this state, for the purpose of constructing a railroad to the boundary line of that state, shall be authorized to extend its road into and through any adjoining state under the regulations which may be prescribed by such adjoining state, and the rights, powers and privileges of such company, over such extension, in

the construction and use of such road, in controlling the property and applying money and assets thereon, shall be the same as if said road had been built wholly within the state of Ohio. See this act copied into Ohio Railway Report of 1870, page 64.

The present Constitution of this State was adopted on the 22nd day of August, 1872, and the sixth section of the Schedule thereto, provides, that if the Constitution and Schedule are adopted by the voters, the Constitution and Schedule should be operative and in full force from, and including the fourth Thursday, (the 22nd day) of August, 1872. The eighth section of the tenth article of the Constitution is in these words, viz: "No county, city, school district or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding, thirty four years: *Provided*, that no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three fifths of all the votes cast for and against the same."

On the 30th day of April, 1872, the Council of the City of Wheeling, in pursuance, and by authority of, the said act of the Legislature of 13th of February, 1872, passed an ordinance composed of some five sections, with a preamble, in which it is expressed as the opinion of said Council that a subscription should be made on behalf of the City to the capital stock of the said Wheeling and Lake Erie Railroad Company to the amount of

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\$300,000, *provided*, said Railroad Company shall give sufficient a guarantee to the Council of the City that it will construct its road into the City and make its eastern terminus, and have its depot ground and buildings thereon, within the corporate limits of the City, east of the east channel of the Ohio River. And for the purpose of taking the sense of the qualified voters of the City, upon the question whether they would authorize a subscription to be made by the Council of the City, in the name and on behalf of the City, to the capital stock of said Lake Erie Railroad Company, to the amount of \$300,000, the Council in said ordinance provided, that polls should be opened and an election held for that purpose on the 1st day of June, 1872. All this was done in due form and in accordance with the provisions of said act of 15th of February, 1872. Under and in pursuance of said ordinance an election was duly held at the time appointed, and at that election more than three fifths of the voters voted in favor of said subscription.

On the 23rd day of April, 1872, the Council of said City, under and by authority of the said act of the Legislature of the 15th of February, 1872, passed an ordinance of seven sections, with a preamble, in which the Council expressed the opinion that a subscription should be made in the name and on behalf of the City of Wheeling to the capital stock of said Wheeling and Ohio Union Railroad Company to the amount of \$300,000, and in due form submitted the same to the sense of the qualified voters of said City, at an election to be held in said City on the 1st day of June, 1872,—the same time as the election before mentioned.

The election was duly held, at the time appointed, and more than three fifths of the qualified voters voted in favor of this subscription also. This was all done, so far as appears, in conformity with the provisions of the last named act.

On the 20th day of January, 1873, the Council of the

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City passed an ordinance, entitled: "An ordinance authorizing and directing a subscription for, and on behalf of, the city of Wheeling to the capital stock of the Wheeling and Lake Erie Railroad Company." The first section of this ordinance ordained that George Adams, Josiah F. Updegraff and Benjamin Fisher, as commissioners in the name and on behalf of the City of Wheeling, shall subscribe for and take six thousand shares of the stock of the Wheeling and Lake Erie Railroad Company on the terms and conditions in said ordinance set forth. By these terms and conditions the said Company is required to construct its road into the City, and make its eastern terminus and have its depot grounds and buildings thereon, within the corporate limits of the City, east of the east channel of the Ohio River. The proceeds of the subscription are required to be expended by the company upon its depot grounds and buildings, at its said eastern terminus, and upon that part of the road between said depot and the point of crossing the Pittsburgh, Cincinnati and St. Louis Railroad in Ohio, including payments from its subscription of stock to the Wheeling and Ohio Union Railroad Company, as provided in said ordinance. The subscription to the stock of the Company is made payable in the bonds of the City of Wheeling as therein, and may thereafter be, provided, by further ordinances, at the par value thereof, with the accrued interest thereon, and shall not be paid by said commissioners any faster than the private subscriptions to the stock of the Company are required to be paid, under and by virtue, of the laws of the state of Ohio, and only as the Company shall progress in the construction of their road eastward of said point of crossing the Pittsburgh, Cincinnati and St. Louis Railroad, to and including the depot and buildings aforesaid in the City, on the monthly estimates of the chief engineer of the actual cost of the same; and no instalment to be paid until a like amount shall be expended and

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actually paid by said Wheeling and Lake Erie Railroad Company for their depot grounds and buildings in the City and upon their subscription to the capital stock of the Wheeling and Ohio Union Railroad Company, exclusive of the first instalment thereon of ten per cent. As a guarantee of the performance of these conditions it was further ordained that said subscription should not be made by said commissioners until the Wheeling and Lake Erie Railroad Company should comply with the following preliminary requisitions: •

“Said railroad company shall definitely and permanently, locate, and secure, by written contract or otherwise, suitable depot grounds for its eastern terminus within the City of Wheeling, to be approved by the City Council, and shall file with the city clerk a written instrument, under the signature of its president and secretary, and the official seal of the Company, giving the assent of said Railroad Company to this ordinance, and such additional ordinances as may be hereafter passed to more effectually carry this ordinance into effect, by providing for the issue and redemption of the bonds which may be issued by the City of Wheeling to pay its subscription herein provided for; and especially agreeing, upon the part of said Wheeling and Lake Erie Railroad Company, that it will construct its road into the City of Wheeling and permanently make its eastern terminus, have its depot grounds and buildings thereon within the corporate limits of the said City, east of the east channel of the Ohio River; and that it will erect and maintain within said City, east of the east channel of the Ohio River, suitable buildings for the accommodation of passengers and freight and engine house or houses, of sufficient capacity to shelter its engines upon the eastern division of its road when not running on the road and machine shops of sufficient capacity at least for the ordinary repairs to its rolling stock on its eastern division.” “The said Wheeling and Lake Erie Railroad Company, in order to aid and secure a proper

connection between its road in the state of Ohio, and its eastern terminus aforesaid, east of the Ohio River, is required to take and subscribe for four thousand shares of the capital stock of the Wheeling and Ohio Union Railroad Company, the latter Company assenting thereto, which subscription shall be payable in cash, and not otherwise, and at least ten per cent. thereof shall be actually paid thereon." It was further ordained that said bonds shall be "payable thirty years after date, in the city of New York, with interest payable at the same place, at the rate of seven per cent. per annum, payable semi-annually, free from city taxation; and for said interest, coupons shall be attached to each of said bonds, and shall be delivered on demand of said Company, subject to the provisions of section one—said commissioners first detaching therefrom and cancelling, any coupons which may have matured."

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On the 20th day of January, 1873, the council of the City passed another ordinance, entitled "An ordinance authorizing and directing a subscription for and on behalf of the City of Wheeling, to the capital stock of the Wheeling and Ohio Union Railroad Company." By the first section of this ordinance, it was ordained, "that George Adams, Josiah F. Updegraff and Benjamin Fisher, as commissioners in the name and on behalf of the City of Wheeling, subscribe and take three thousand shares, of \$100 each, of the capital stock of the Wheeling and Ohio Union Railroad Company, conditioned for payment as therein provided. The second and third sections of this ordinance prescribe the terms and conditions upon which the subscription shall be made. This subscription, this ordinance provides, shall be paid in the bonds of the City, at the par value thereof, and accrued interest thereon, &c., and the bonds shall be payable thirty years after date in the city of New York, with interest payable at the same place, at the rate of seven per cent. per annum—payable semi-annually, &c Each of

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the two named ordinances took effect and was in force from the passage thereof. The Council did not pass any ordinance providing for the collection of a direct annual tax sufficient to pay, annually, the interest on such debt, and the principal thereof within, and not exceeding, thirty-four years.

Under these circumstances and facts, Henry K. List and a large number of other persons owning property in the City of Wheeling, subject to taxation by the corporate authorities thereof, who sue as well on behalf of themselves as all other persons owning property in the City of Wheeling, subject to taxation by the said corporate authorities, thereof, except the defendants named, presented to the judge of the circuit court of the county of Ohio, in which said City is, a petition, prayer and bill, in which is set forth the said two acts of the Legislature of the 13th and 15th of March, 1872, the said ordinance and facts hereinbefore stated, and in which it is also alleged and averred, substantially, that the said two acts, although otherwise separate and distinct, are parts of the same scheme or plan of improvement, having in view the construction, maintenance, and working of a continuous line of railway between a depot on the east side of the east channel of the Ohio river, in the City of Wheeling, and Toledo, in the county of Lucas, in the State of Ohio. That the two subscriptions authorized by these several acts are so mutually dependent upon each other, that no authority has been given to make either separately, or rather neither can be made unless the objects of both acts shall be accomplished; that the city of Wheeling had not before the 22d day of August, 1872, being the fourth Thursday of that month, authorized it bonds to be issued for or on account of the before-mentioned subscriptions, or either of them, or any part thereof; and that the indebtedness of said City on the said 22d day of August, 1872, amounted to, and still is, not less than \$641,000; and that the value of the taxable property within the limits of

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the said City, ascertained by the assessment for state and county taxes for the year 1872, is less than \$12,206,850, and five per centum thereon would be less than \$610,343; and, therefore, they say, that if either or any part of the said subscriptions, on behalf of the City of Wheeling be made, the said City would thereby become indebted, after said fourth Thursday of August, 1872, to an amount, including its existing indebtedness, in the aggregate, largely exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of said indebtedness; that the plaintiffs have good reason to believe that the said ordinances authorizing said subscriptions will be carried into execution; that the Wheeling and Lake Erie Railroad Company have not given, and are incapable, under their charter, of giving, to the Council of the city of Wheeling, the guarantee required by the third section of the said act of 13th of February, 1872; that the said Railroad Company will construct its road into said City, and make its eastern terminus and have its depot grounds and buildings thereon, within the corporate limits of said City, east of the east channel of the Ohio river; that they, (plaintiffs) are, respectively, owners of real and personal property in the said City of Wheeling, subject to taxation by the corporate authorities thereof, and are residents and voters of the City, and that by reason of the unlawful subscription proposed to be made and debts proposed to be contracted on behalf the said City, by the ordinances aforesaid, they and their property will be subject to heavy burdens, contrary to the Constitution and laws of the State. The city of Wheeling, the Mayor and Council thereof and the said commissioners and others are made defendants to said bill. The bill then prays that the City of Wheeling, and the other defendants, by injunction, be enjoined and restrained from making the subscriptions, contracting the debts and issuing the bonds aforesaid, or either or any part thereof.

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The judge of said circuit court granted the injunction prayed for, after notice to the defendants. An official copy of the charter of the Wheeling and Lake Erie Railroad Company is filed with the bill as exhibit No. 1, which was filed with the secretary of the state of Ohio on the 6th day of April, 1872, showing the capital stock of the Company to be \$500,000.

At rules on the first Monday in March, 1873, the plaintiffs filed their bill with the order of injunction endorsed thereon in the clerk's office of the circuit court of Ohio county. George Baird, Andrew Wilson, John Butterfield, George Forbes, Porter Smith and Jacob Altmyer, filed their answer to the bill, in which there is a demurrer, and to this answer there was replication. None of the other defendants answered. The defendants who answered admit most of the material allegations of the bill. But they deny the allegation in the bill that said Wheeling and Lake Erie Railroad Company has no authority of law to construct its said railroad into said City of Wheeling and make its eastern terminus as required in the ordinance aforesaid. They deny that the capital stock of the Wheeling and Lake Erie Railroad Company is but \$500,000—as alleged in the bill, and say that the exhibit No. 1 filed by plaintiffs with their bill, is but a copy of the original certificate of incorporation under the general laws of the state of Ohio, defining the powers and regulating railroad companies, thus chartered under them; that under and by virtue of said laws of the state of Ohio the capital stock of said Company has been increased from the amount named in the original certificate to \$4,000,000—which change was made on the 29th day of March, 1872, as shown by the subsequent certificate and amended charter, an official copy of which is filed with the answer marked A. For the powers of said Company, by virtue of its charter in Ohio, these defendants refer the court to the general corporation laws of that state. As to the powers of said Company to extend

its road into the City of Wheeling they refer to the said act of the Legislature of this State passed March 1, 1871. They also say that the extension of said Company's road into the City of Wheeling would be highly beneficial, and promotive of the objects of the Company. They deny that the existing indebtedness of the City of Wheeling amounts to \$641,000.00, or to five per cent. of the value of the taxable property of said City as alleged in the bill, and particularly after applying the moneys on hand and in the sinking fund for the redemption of portions of its outstanding bonds; but they admit that if the amounts proposed to be subscribed by said ordinances to said Railroad Companies, or either of them, should become an indebtedness of the City by reason of said Railroad Companies or either of them, complying with the terms and conditions of said ordinances, within a reasonable time, say within the next year, that the indebtedness of the City would then (including the other indebtedness,) exceed five per centum of the value of taxable property therein as assessed for taxation for state purposes—They say they do not know whether said ordinances will hereafter be carried into execution or not, but they suppose it will depend on the financial ability and action of the said Wheeling and Lake Erie Railroad Company by giving its assent to the ordinances, and the guarantee required by the ordinance authorizing the subscription to its stock—They say that that ordinance, as well as the other authorizing the subscription of stock, contemplate the passage of an additional ordinance by the said Council before any subscription is made providing for a direct annual tax sufficient to pay annually the interest on the debt to be contracted by the City on account of said subscription and the principal thereof in thirty-four years; that such an ordinance has not been passed, but was pending before the City Council when said two ordinances authorizing subscriptions of stock were passed; but no action has been had thereon since. But whether such an ordinance is passed or not they insist is not material

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to this cause. They admit that the guarantee required by the act of the Legislature has not yet been given, and they do not believe any subscription will be made until such guarantee is given.

At April rules 1873 the cause seems to have been set for hearing, and at a circuit court held for the said county of Ohio on the 7th day of May, 1873 the cause came on, by consent, to be heard on the bill, exhibits filed therewith, the summons and return, the former proceedings and orders therein, the answer of defendants Baird, Wilson, Butterfield, Forbes, Smith and Altmeyer, the exhibits filed therewith, and replication to the answer, and the court adjudged, ordered and decreed that the defendants and each of them, be and they are, hereby, perpetually enjoined and restrained from contracting the debts and issuing the bonds in the bill of complaint mentioned, or any or either of them, or any part thereof, and that the plaintiffs recover their costs in this behalf expended, from the defendants.

The summons in the cause seems to have been executed and so returned to the clerk's office at March rules when the bill was filed. From the record there might be some question as to whether this cause was so matured, at its final hearing, as to authorize the final decree if it were otherwise correct; or as to how it was heard. But as the parties seem to desire a decision of the cause upon its merits, I will consider it as though it was heard upon the bill and exhibits, the answer and exhibits therewith filed and replication thereto, bill taken for confessed as to all the defendants who did not answer, and by consent. This I think is authorized by the time at which the bill was filed and the right of the court below to correct the proceeding, had at rules, in order to hear the same and make final decree therein. A critical examination of the record shows that at the hearing the bill might have been taken for confessed as to all the defendants, except those who answered; but I do not deem it material to stop to discuss this question, as it can make

but little difference, if any, in the final result to be arrived at.

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The *first* question to be considered in this case is what is the true meaning and intent of the eighth section of tenth article of the Constitution? Does it operate so as to affect, invalidate, or repeal or modify the said acts of the Legislature of the 13th and 15th day of February, 1872, before cited, or any part thereof? Or is it simply addressed, not to past legislation, but to the legislature created by the Constitution? I have already quoted at large the said eighth section of the tenth article of the Constitution. "The object of construction, as applied to a written constitution is, *to give effect to the intent of the people in adopting it.*" It is a rule of construction that the whole constitution is to be examined, with a view of arriving at the true intention of each part: This is because the instrument is adopted by the voters as a whole, and an article or section standing by itself, which might seem of doubtful import, may yet be made plain, by comparison with other clauses of the instrument." "A constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect. And the same rule applies to statutes." Cooley's Con. Lim. 62. The administration of public justice is referred to the courts. To perform this duty, the first requisite is to ascertain the facts, and the next to determine the law that is applicable. The constitution is the fundamental law of the state, in opposition to which any other law must be inoperative and void. If, therefore, such other law seems to be applicable to the facts, but on comparison with the fundamental law it is found to be in conflict, the court in declaring what the law of the case is, must necessarily determine its invalidity, and thereby, in effect, annul it. It was admitted in argument that the said acts of the 13th and 15th of February, 1872, so far as any part thereof applies to the City, were not in violation of the Constitution of 1863, which was in force at their passage and that said acts

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were in force and valid up to the time the present State Constitution took effect, and are still in full force, unless repealed or modified by some provision of the present Constitution or some act of the Legislature, passed since the adoption of the present Constitution. All acts of the Legislature in force at the time the Constitution took effect which are plainly in conflict with the Constitution, or any of its parts, when rightly construed, are modified or repealed, to the extent of such conflict. All acts authorized to be done by laws in force prior to, and at the time of the adoption of the Constitution, which are clearly forbidden to be done by the Constitution, must be considered as prohibited, provided the obligation of a contract will not thereby be impaired.

It cannot be ascertained from the face of the acts of the Legislature in question, whether they are in conflict with the eighth section of the tenth article of the Constitution or not, except that they do not contain the constitutional limit as to amount of debt, the provision for payment of interest and principal, &c., in thirty-four years; or whether the authority given in said acts or either of them, to the City of Wheeling, or her Council, to subscribe for, and on her behalf, to, or for, the stock of said Railroad Companies, in said acts, or either of them, mentioned, and thereby create a debt or debts to the amount of three or six hundred thousand dollars, or any greater or less sum, is prohibited by said section and article, except as aforesaid. This depends, upon whether said section eight of the tenth article operates as a prohibition upon the City upon the value of the taxable property within the City at the last assessment, at the time of the subscriptions and issuing of the bonds of the City were directed or authorized by the Council to be made, and intended to be made, and upon the then existing debt of the City.

It is admitted, by the answer in the cause, that if the subscriptions were made, or either of them, and the bonds of the City issued to the amount of either sub-

scription, that the debt of the City would, thereby, be increased beyond the amount specified in said eighth section of the tenth article of the Constitution. For the purposes of this suit it must be considered, therefore, that if said section of said article is addressed and applies to the City of Wheeling, and all others, and is not simply prospective and addressed to the Legislature, alone, then the making of said subscriptions, or either of them, in the bonds of the City, as authorized or directed by the Council of the City, is prohibited by said section and article of the Constitution, and will not be allowed. And, also, though the making of a part of the amount of said subscriptions, or either of them, or any part thereof, would not increase the debt of the City beyond the amount specified in said section, still the subscriptions, or either of them, or for any part thereof, cannot be allowed, and are unauthorized without the Council of the City providing, at the same time, for the collection of a direct annual tax, sufficient to pay annually, the interest on the debt, and the principal thereof, within, and not exceeding thirty-four years. This, it is admitted, was not done, and it is claimed, by defendants, that it was not necessary—that said section of the said article of the Constitution does not, in anywise, affect the authority of the City or its Council, under said acts, or either of them, so far as they apply to the City or its Council. Is the eighth section of said tenth article of the Constitution addressed to the City, &c., or is it directed to the Legislature, only? It will be found, on an examination of the Constitution, that many of its sections are expressly directed to the Legislature. Such sections, under the weight of judicial decisions upon that subject, do not apply to or affect laws passed, and in force at the adoption of the Constitution, in so far as they are directed to the Legislature, as the Legislature therein named is held to mean, the Legislature created by that constitution.—*Cass v. Dillon*, 2 Ohio St., 607; *State*

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*ex rel. Mo. & Miss. R. R. Co., v. Macon Co. Ct.*, 41 Missouri, 453; *Slack v. Maysville and Lexington Railroad Company*, 13 B. Monroe, (Ky.) 1; Cooley's Con. Lim., 62, note 2, and authorities there cited. The language of the said eighth section is, "No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted," &c. Can it be said, with any plausibility, that these words are directed only to the Legislature? They are directly, and expressly directed to the counties, cities, &c. Such is the plain language, and there is no room for doubt; and all persons, officers, and all departments of the government, are bound by the prohibition. The Legislature may legislate in aid of this section, but not in violation of it. The question presented here is not similar to those presented in the cases in Ohio, Kentucky, Missouri, &c., to which I have referred specially. There the sections of the Constitution drawn in question, were expressly and clearly directed to the legislature. The question presented in this case, is more like the question presented in the case of *Aspinwall v. Com. of Davies Co.*, 22 Howard, (Sup. Ct. U. S.), 364 though the constitutional provision in that case is not in the precise phraseology of the section of our Constitution, in question here: "Still, I think they are substantially of the same character. So much of the eighth section of said tenth article of the Constitution, as is drawn in question here, speaks from, and including, the 22d of August, 1872, the day of its adoption by the qualified voters of the State. The words "already" and "hereafter," as used in the section, plainly have reference to that time. It was at that time that the Constitution acquired life and force. The case of *Groves v. Slaughter*, 15 Peters, (Sup. Ct. U. S.), 449, has been cited in argument by appellants, but the phraseology of the section in question, in that case, is materially different from this case, and the court there held that legislation was "indispensable" to give effect to the section.

The City, under its charter, and amendments thereto, could only authorize and direct its bonds to issue by, and through its Council. The Council did not direct subscriptions to be made and the bonds to issue till long after the 22d of August, 1862. The eighth section of the tenth article of the Constitution applies to these bonds clearly, and they do not come within the exception specified in said section. The plain and evident meaning, and intent of the people in the adoption of this section of the tenth article of the Constitution was to prescribe a limit beyond which cities, counties &c., should not go in the contraction of debts.

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The section and article of the Constitution under consideration was not intended to, and does not in anywise, interfere with or prevent the levying, collecting and expenditure of taxes annually, by authority of law, by the proper, legal authorities of the counties, cities, &c., for needful and proper purposes of such counties, cities, &c., and to do and cause to be done whatever is necessary for that purpose, including the making and causing to be made, contracts touching the disbursement of the taxes levied and collected annually and the like: And all this without a vote being taken under said eighth section of said tenth article of the Constitution. Sections seven and nine, article eighth section twenty-eight, article twelve. It was intended to prevent the county authorities, city authorities &c., respectively, from creating debts against the counties, cities, &c, respectively without the assent of three-fifths of the voters of the county or city, &c., voting upon the question, as to whether the debt should be created, and then not exceeding the limit prescribed in the section. The evident object of the section was to prevent a growing evil of the day, viz: The creation of large debts, the unnecessary and wasteful, as well as fraudulent, expenditure of the substance and earnings of the people and unnecessary and oppressive taxation. Whether the section will accomplish the object or not remains to be seen by experience. It is to be hoped it will.

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"The real purpose and intention of the legislature is the thing to be ascertained in the construction of a statute." "All rules of construction must yield to the expressed will of the legislature and to the will of the people as expressed in the constitution. General laws do not repeal special or local laws, unless the intent clearly appears." It has been well asked what was the intent of the constitutional provision under consideration, except to limit and restrict the privilege of contracting debt, which was allowed by former legislation, general or special, to cities, counties, &c., as well as the limiting of the privilege afterwards. In many instances, to accomplish the object sought, it was just as necessary to restrict the privilege conferred by former laws, as to prevent it in future. This may be readily seen by consulting prior legislation upon the subject. A constitution scarcely ever repeals a former statute by express reference thereto—it is generally done, when intended, by the use of general terms upon the subject had in view. The counsel of the appellants has referred to the third section of the eleventh article of the Constitution as qualifying or suspending the operation of the eighth section of the tenth article. The section is in these words, viz: "All existing charters of special or exclusive privileges under which organization shall not have taken place or which shall not have been in operation within two years from the time this Constitution takes effect, shall thereafter have no validity or effect whatever. "Provided, That nothing herein shall prevent the execution of any *bona fide* contract heretofore lawfully made in relation to any existing charter or grant in this State." The whole of said eleventh article of the Constitution, unless said third section is an exception, is in relation to joint stock companies and private corporations so called—municipal corporations are not the general or special subject of the article in any part of it and indeed are not mentioned or referred to.

It has been suggested that the said third section from its connection, its language, and the general and special subjects of the article, was not intended to apply, and does not apply, to municipal corporations. This may be true but I do not now decide that question—regarding it immaterial to this case, as I am clearly of the the opinion that the said third section does not qualify or suspend the operation and effect of said eighth section of the tenth article. The said third section is not a grant of charters or of special or exclusive privileges, or an enlargement of charters, or special or exclusive privileges, but simply provides that all such, under which organization shall not have taken place within two years from the time the Constitution takes effect, shall thereafter have no validity of effect whatever—subject to the proviso therein contained, which clearly does not apply here. The incorporation of municipal corporations is embraced in the thirty-ninth section of the sixth article of the Constitution, and that section is specially directed to “the Legislature,” and does not repeal or affect prior subsisting acts of incorporation, of a municipal character, but applies to future legislation. By reference to the Constitution it will be seen that quite a number of the sections of different articles thereof, are directed to the Legislature. See third Article sec. 7; Article 4, secs. 8 and 11; Article 6, secs. 18, 36, 37, 39, 40, 43, 45, 49 and 50; Article 8, secs. 13, 15 and 22; Article 9, secs. 3 and 6; Article 10, secs. 2 and 9; Article 11, secs. 4, 5 and 10; Article 12, secs. 1 and 12: The character of these sections is wholly different from that under consideration, as may be seen by reference thereto. The Legislature, however, may amend and, perhaps, repeal prior subsisting acts, incorporating municipal corporations.

It has been suggested in argument that the said eighth section of the tenth article of the Constitution applied to this case interferes with vested rights or impairs the obligation of contracts. The case of *Aspinwall v. The*

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*Board of Commissioners of the county of Davies* decided by the Supreme Court of the United States, is a case in point, and fully meets and overrules this suggestion. It is reported in 22 Howard, (Sup. Ct. U. S.) page 364. Among other things, it is decided in that case, "that the mere vote to subscribe did not, of itself form such contract, with the railroad company, as would be protected by the tenth section of the first article of the Constitution of the United States. Until the subscription was actually made the contract was unexecuted." In that case the vote of the people of a county was taken under an act of the legislature upon the question of subscription, &c., as here, and afterwards the people of the State of Indiana adopted a new constitution, one of the articles of which prohibited subscriptions by a county unless paid for in cash, and prohibited, also, a county from loaning its credit or borrowing money to pay such subscriptions. And after the adoption of the new constitution the county commissioners made the subscription authorized by the act of the legislature and issued the bonds of the county therefor; and it was held that said article of the Indiana constitution was operative and applied to the county commissioners and repealed the act of the legislature authorizing the subscription.

Under the averments of the bill and the ordinances of the Council filed therewith I think it was not error to unite both subscriptions in the bill. The jurisdiction of equity in such cases as this seems to be established by a number of judicial decisions. When I first examined the final decree in this cause perpetuating the injunction, it struck me that by the terms employed, viz: "That the defendants and each of them be, and they are, hereby enjoined and restrained from contracting the debts and issuing the bonds in the bill of complaint mentioned, or any or either of them, or any part thereof," it was too broad; upon careful examination, however, I am satisfied that the decree should be con-

strued to apply only to the said ordinances of the Council of the City authorizing the subscriptions, or either of them to be made and authorizing the issuing and payment thereof or any part thereof in the bonds of the City and the making of said subscriptions, or either of them, for the amounts thereof or any part thereof in such manner as to create a debt against the City. That it does not prohibit the City of Wheeling or its Council from hereafter contracting any such debt, and issuing the bonds of the City therefor, when done in pursuance of and according to the provisions and within the restrictions and requirements of the said eighth section of the tenth article of the Constitution and any act of the Legislature which may then be in force not in conflict with or contrariant to said section and article, no matter whether such debt be created by subscribing to or for the stock of said railroads or either of them, or any other purpose. In such case to make the action valid all the requirements of said eighth section of the tenth article of the Constitution must be observed, and complied with in contracting such debt.

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There were some other questions made in this cause which, under the view I have taken, are immaterial and unnecessary now to determine.

Construing said final decree and its effect, as above stated, and for the reasons above stated, the decree of the circuit court of the county of Ohio perpetuating the injunction awarded in the cause, which was rendered on the 7th day of May, 1873, must be affirmed with costs to the appellees and \$30 damages.

The other Judges concurred.

DECREE AFFIRMED.

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## CAMDEN v. WERNINGER.

July 13, 1874.

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A case finally decided in the Supreme Court of Appeals, has become "*res adjudicata*," and is no longer the subject of review in that Court.

Appeal, by Alstorpheus Werninger, from a decree of the circuit court of Harrison county, rendered on the 14th day of October, 1871, in a suit in chancery therein pending, wherein Gideon D. Camden was complainant and Alstorpheus Werninger, Lee Haymond and Luther Haymond, were respondents. The facts appear in the opinion of the Court.

The Hon. Thomas W. Harrison, judge of said circuit court, presided at the hearing below.

*Daniel Lamb* for the appellant.

*Caleb Boggess* for the appellee.

## PAULL, JUDGE:

In February 1869, the plaintiff, G. D. Camden, filed his bill in chancery in the circuit court of Harrison county, against A. Werninger and others, for the recovery of a claim or demand against said Werninger, for the sum of \$2,500 with interest. In this suit such proceedings were had, that on Wednesday, the 15th day of June, 1870, a decree was entered in favor of the plaintiff, reciting that he was entitled to the payment of his said debt with interest thereon from the time specified in said decree, and subject to the credit therein mentioned ;

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said decree provided further, that unless said defendant A. Werninger, pay to the plaintiff the amount of his said debt and interest, within thirty days from the date of said decree, that defendants Luther Haymond and Lee Haymond deliver to Ernest A. Duncan, a commissioner appointed by the court, four one thousand dollar United States bonds with the coupons thereon, to be by him sold, and out of the proceeds of sale, to pay to the plaintiff the amount in said decree specified and his costs by him expended in the prosecution of his suit. Other matters are contained in said decree, but the above is all now necessary to notice.

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From the foregoing decree the defendant A. Werninger appealed, and the case was submitted and heard in the Supreme Court of Appeals; and at a session of that Court held on the 19th day of August, 1871, the following decree was entered, to-wit: "The Court, having maturely considered the transcript of the record of the decree aforesaid, together with the arguments of counsel thereupon, is of opinion, for reasons stated in writing and filed with the record, that there is error in said decree: Therefore it is adjudged ordered and decreed that the decree aforesaid be reversed and annulled, and that the appellee do pay to the appellant, Alstorpheus Werninger, his costs about the prosecution of his appeal in this behalf expended. And this cause is remanded to the circuit court of Harrison county, for further proceedings to be had therein, in accordance with the principles laid down in said written opinion."

The cause being remanded to the circuit court for further proceedings, some additional testimony was taken, and on the 14th day of October, 1871, the circuit court entered a decree that defendant A. Werninger pay to the plaintiff \$3,121 with interest from the 3rd day of October, 1871, and his costs by him expended; and unless said amount be paid within thirty days from the date of said decree that Caleb Boggess, who was appointed commissioner for

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the purpose, sell the four one thousand dollar United States bonds, hereinbefore mentioned, with the coupons, or so many thereof as may be necessary; to satisfy the plaintiffs, said decree, and report his proceedings therein to court.

From this decree, the defendant A. Werninger has again taken his appeal to this Court.

The decree of the 14th of October, 1871, in the material part complained of, to-wit: that which establishes the debt or demand against the defendant Werninger, and directs the sale of the United States bonds for the payment of the same, is similar to the former decree, made the 15th day of June, 1870, and which was the subject of review in the appellate Court; the only difference being as to the amount of interest to which the plaintiff is entitled—the former decree being made to correspond in this respect, with the instructions of the Supreme Court.

Thirteen objections are presented by one of defendant's counsel to said decree and three by the other, that is to to the decree of the 14th of October, 1871, now under consideration.

We may now remark that this case as now presented to us, is the same in all material respects as it was when before under consideration by the Supreme Court, and that all the objections now made, except two, to-wit: The tenth in the argument of one counsel, and the second in the brief of the other, must have applied and did apply with all their force to the former decree as they do to the present; we presume they were then made, and the decree was reversed on the ground of error in the allowance of interest, and the cause remanded to the circuit court "for further proceedings to be had in accordance with the principles laid down in the Court's written opinion." We have carefully examined that opinion, and find, according to our judgment, that the principles there laid down for the guidance of the circuit court in this case have either directly and expressly, or by implication and in substance, disposed of all the aforesaid objections, ex-

cept the two hereinbefore referred to. We do not perceive that it would subserve any useful purpose, or decide or illustrate any principle of law whatever, to take up those objections and examine them in the light of the reasons or principles expressed in that opinion, and which must now govern or control in the decision of this cause. This would be a work of supererogation, and we metely state, therefore, the conclusion we have arrived at, after mature consideration ; and we agree, consequently with the circuit court, as expressed in said decree, "that the character of the cause has not been changed since the same was considered by the Court of Appeals." To give further expression to our views, would be doing little else than incorporating the objections and the reasons of that court into this opinion.

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The tenth objection above referred to, to-wit : that the erred in sustaining the exception of the plaintiff Camden, made to the filing or reading of a record therein named, is not valid. The record here referred to is the reeorod of a case between different parties, and to which the plaintiff Camden was not a party, and consequently said record and the depositions therein contained, are not evidence against him, and his exception to the same as evidence was properly sustained.

The only remaining objection has relation to the question of interest, or the time from which it should be computed. It is not perceived that there is any error in the decree in this respect. The decree of the circuit court of Harrison county, made on the 14th day of October, 1871, is affirmed, with costs to the appellee.

The other Judges concurred.

**DECREE AFFIRMED.**

## WHEELING.

## MASON &amp; HOGE v. WARTHENS.

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1. The twenty-first section of the Bankrupt Act, of 1867, so far as the stay is concerned, applies to personal final judgments against the debtor, and not to judgments against the property attached, or the proceeds of the sale thereof, when the attachment lien accrued prior to the filing of the petition in bankruptcy.
2. An attachment lien, acquired regularly, without the procurement or sufferance of an insolvent debtor, to give preference to the attaching creditor over other creditors, will not be displaced by virtue of the thirty-fifth or thirty-ninth sections, by subsequent proceedings in bankruptcy, though commenced within four months after the levy of the attachment.
3. Under said sections something more than passive non-resistance in an insolvent debtor is necessary to invalidate an attachment lien on his property, when the debt is due and he has no defence.
4. In such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the attachment and levy thereof, and a failure to do so is not sufficient evidence of an intent to give a preference to the attaching creditor or to defeat the operation of the Bankrupt Law.
5. Though the attaching creditor, in such case, may know the insolvent condition of the debtor, his attachment and levy upon his property are not, therefore, void and are no violation of the Bankrupt Law.

Appeal, by B. H. Warthen, B. G. Warthen, the defendants below as partners composing the late firm of B. H. Warthen & Bro., and Stephen Hunter, assignee of said B. H. Warthen & Bro., a firm composed, as aforesaid, from a judgment of the circuit court of Greenbrier county, in four several suits at law, against certain attached effects which belonged to said B. H. Warthen & Bro., entered

on the sixteenth day of October, 1872. The plaintiffs below were Claiborne R. Mason and Charles E. Hoge, partners composing the firm of Mason & Hoge, in the *first* suit; P. B. Hoge and said Charles E. Hoge, partners composing the firm of P. B. Hoge & Bro, in the *second* suit; Thomas L. Feamster in the *third* suit and Jesse C. Bright in the *fourth* suit. The appeal appears to have been taken in the name of the said Warthens, individually, and not as partners or late partners. The other facts appear in the opinion of the Court.

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The Hon. Joseph M. McWhorter, judge of said circuit court, presided at the trial below.

*Samuel Price*, for the appellants.

*John W. Harris*, for the appellees.

HAYMOND, PRESIDENT:

The case *first* named, in the statement of the case, is an action of debt brought by the plaintiffs therein against B. H. Warthen and B. G. Warthen, partners in business under the firm name of B. H. Warthen & Bro. in the circuit court of Greenbrier county, in this state. The action was commenced on the 20th day of March, 1872, and the summons therein was executed on defendant B. H. Warthen on the 21st of same month and on defendant B. G. Warthen on the 1st day of May, 1872. On the same day the action was brought the plaintiffs therein, sued out, in their suit, an order of attachment against the estate of the defendants, which was levied by James Knight, sheriff of Greenbrier county, on sundry articles of personal property. On the 28th of March, 1872, the same plaintiffs sued out in their suit another order of attachment against the estate of the defendants which was levied on sundry articles of personal property of defendants on the same day, by a constable of said county. Each of the orders of attachment were made returnable to the first day of the next



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term of the circuit court of said county. These proceedings were had under the provisions of chapter one hundred and six of the Code of this State as amended by the act of the Legislature, passed the 27th day of February, 1871. Acts of Legislature of 1871, pp. 181, 182. Bond and security was given by the plaintiffs and filed with the clerk of the court before the attachments issued.

The suit, *second* above named, was brought by the plaintiffs therein, against the same firm on the same day of the suit first named, and is an action of trespass on the case in assumpsit; and two separate orders of attachment were sued out in the suit, corresponding in date, respectively, with the orders of attachment above named, and were severally executed by the same officers and were made returnable at the same time and to the same court. The circuit court afterwards, at the April term, 1872, thereof, made an order directing the officers who levied the attachments to make sale of so much of the property, so levied upon, as was necessary to pay the debt of the plaintiffs with interest, cost and expenses of sale.

The case of the plaintiff, *third* above named, is an attachment issued by a justice on the 10th day of May, 1872, against the estate of B. H. and B. G. Warthen, for a debt therein named, and was made returnable to the next term of the circuit court of said county, thereafter. This attachment was levied by the same constable, before referred to, on the day of its date, upon various articles of property, on all of which previous attachments of Hoge and others were levied, except some tools and hammers.

The suit of the plaintiff, *fourth* above named, is an action of trusspass on the case in assumpsit and was brought on the 16th day of May, 1872, in the same court and the summons therein was executed on the 18th day of May, 1872. On the day this suit was brought the plaintiff therein sued out, in his suit, an order of at-

tachment returnable to the next term of the same court thereafter, which, on the day of its date, was levied by the same constable on various articles of personal property, upon nearly all of which the previous attachments had been levied.

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On the 24th of May 1872, the judge of same court, in vacation, made an order directing the constable, who levied the two last named attachments, to sell the property upon which they were levied for cash, &c: And the court and judge, in and by said orders of sale, directed said sheriff and constable to report their proceedings, under said order, to the court.

The sheriff made sale under the order of court, of the property levied on by him to the amount of \$1,453.33, and the costs attending the keeping of the property were \$170.

The constable, also, under said orders of court and of the judge in vacation, sold property to the amount of \$97.85.

It appears, by the record in this case, that at a term of the circuit court aforesaid, held on the 16th day of October, 1872, upon the calling of said causes, the defendants, therein, by counsel, moved the court to enter in each cause an order in these words, viz: "It being made to appear to the court that the defendants have been declared bankrupt since the institution of these suits, upon the motion of the defendants, it is ordered that the same be stayed to await the determination of the court of bankruptcy on the question of their discharge from their debts." And they produced in evidence, in support of their motion, a copy of an order of W. W. Forbes, Register in Bankruptcy for the District Court of the United States for the Eastern District of Virginia, showing that B. G. Warthen, by whom a petition for adjudication of bankruptcy was filed on the 16th day of July, 1872, was, on the day and year last aforesaid, upon good proof taken, found by him to have become a bankrupt within

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the true intent and meaning of the Act of Congress, entitled, "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and that at that time the Register declared and adjudged him a bankrupt. And also a copy of an order of the said District Court showing that in the matter of B. G. Warthen v. B. H. Warthen & Bro., against whom a petition in bankruptcy was filed on the 1st day of October, 1872, (more than four months after the attachments were levied) in that court, at Richmond, on the same day before Hon. John C. Underwood, judge of the Eastern District of Virginia, at a regular term of said court, said matter came on to be heard and the said B. H. Warthen having filed his written consent to an adjudication in bankruptcy being entered, it was adjudged that B. H. Warthen & Bro., became bankrupt within the true intent and meaning of the said act establishing a uniform system of bankruptcy throughout the United States, before the filing of said petition, and they are therefore adjudged bankrupt accordingly.

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And, also, that Stephen Hunter, by his counsel, presented his petition, as assignee in bankruptcy, which he asked to have made applicable to all of said causes. The petition in substance "petitions the court, and says that, by decrees of the District Court of the United States, for the Eastern District of Virginia, the said firm of B. H. Warthen & Bro., was declared bankrupt, and that he was appointed assignee of B. G. Warthen, and is thereby entitled to the money and effects of B. G. Warthen, now in the hands of the sheriff of this county, and of the constable of Lewisburg township, and under the control of this court, for which moneys he has received an order and assignment from W. W. Forbes, Register in Bankruptcy, which he prays may be delivered over to him accordingly, and that the attachments in these causes may be dissolved." And he accompanied the petition with the two orders, before men-

tioned, and, also, a copy of an assignment from said Forbes, as Register in Bankruptcy, to Stephen Hunter, of Richmond, in the county of Henrico, and state of Virginia, assignee of the estate of B. G. Warthen, duly declared bankrupt by said District Court, conveying and assigning to the said Stephen Hunter, assignee as aforesaid, all the estate real and personal, of the said B. G. Warthen, bankrupt, including all property of whatever kind of which he is possessed, or in which he was interested or entitled to have on the 16th day of July, 1872, &c.; also a copy of an order substantially in these words, viz: "In the District Court of the United States for the Eastern District of Virginia. In the matter of B. G. Warthen, of the firm of B. H. Warthen & Bro., bankrupts. Upon the petition of Stephen Hunter, assignee of the above named bankrupts, it is adjudged, ordered and decreed that ——— Knight, sheriff of Greenbrier county, West Virginia, and the constable of Lewisburg township, in said county, and State, pay over to said Hunter, assignee as aforesaid, whatever moneys are in their hands belonging to said bankrupt's estate, or to the firm of B. H. Warthen & Bro., the proceeds of the sale of certain property of said bankrupts, sold by the said sheriff and constable." But the court refused to enter said order staying the said causes, and to allow said petition.

To all the judgments of the court and for failing to allow the petition of said Hunter to be filed in said causes and for failing to dissolve the attachments as prayed for, the defendants and Hunter excepted and tendered their bill of exceptions which was signed, sealed and made a part of the record.

The court after refusing to direct the stay and to allow the petition of Hunter to be filed, and at the same time, proceeded to, and did, render, in said four causes, judgments against the proceeds of the sale of the property attached, on proof being made, as follows: Mason & Hoge, \$699.92;

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P. B. Hoge & Bro., in the sum of \$144.59; Thomas L. Feamster \$193.07; to J. C. Bright \$195.95,—all as of the 15th day of September, 1872, together with the costs of their respective suits and directed the sheriff and constable who made the sales of the property levied on to pay out the fund in their hands, arising from said sales, to the said several plaintiffs, in the order they are above named, with interest and costs above mentioned, and that they bring the residue into court, subject to its future order.

The judgments in the causes are all embraced in one order. The court did not render personal judgments against the defendants and the order so states.

From the action of the court in refusing the stay asked by the defendants and in relation to said petition, &c., the defendants, and Hunter the assignee, have appealed to this Court and assign the following as errors committed by the circuit court, viz:

*First*, In refusing to make the order staying the proceedings until the action of the court in bankruptcy, upon the question of discharge, should take place.

*Second*, In refusing Hunter, assignee in bankruptcy, of Warthen, to file his petition.

*Third*, In proceeding to distribute the attached effects among the attaching creditors.

No other questions are presented to us by the appellants, and so far as we are advised, no other question fairly arises upon the record upon this appeal and we do not now determine any other questions.

To a proper understanding of the questions under consideration, it is necessary to recur to some of the sections of the bankrupt law of 1867, which are applicable. It is provided by the twenty-first section of the act, that no creditor, proving his debt or claim, shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt; and all

proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby. And no creditor, where his debt is provable, under this act, shall be allowed to prosecute to final judgment, any suit at law or in equity, therefor, against the bankrupt until the question of the debtor's discharge shall have been determined. And any such suit or proceeding upon the application of the bankrupt, shall be stayed to await the determination of the court in bankruptcy on the question of the discharge: *Provided*, there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge: *And provided, also*, That if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy; but execution shall be stayed as aforesaid. It does not appear, nor is it claimed, that the plaintiffs, or any of them, have proved or attempted to prove, their debts in bankruptcy, but so far as is disclosed, they are of such character as to be provable under the bankrupt law. The plaintiffs' debts are against the firm of B. H. Warthen & Bro. Bump, in his Law and Practice of Bankruptcy, pages 175 and 176, says: Courts of bankruptcy "have no authority to withdraw cases instituted in other courts before the commencement of proceedings in bankruptcy from those courts, and proceed to settle and adjust the claims of the parties thereto. Congress could, no doubt, have made an adjudication in bankruptcy operate, *proprio vigore*, to transfer all cases which should be pending in other courts at the time of the filing of the petition, and to which the bankrupt should be a party, from those tribunals into the courts of bankruptcy. It has, however, not done so. It not only has not deprived the other courts of jurisdiction over such causes, but it has provided for their prosecution and defence in these courts by the assignee. This principle applies not only to all or-

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dinary actions to collect a debt, but also to all proceedings to enforce a lien, so long as the amount due is in dispute, or remains unascertained. The lien of an attachment, or the lien of a creditor upon property conveyed in fraud of creditors, or the lien of a partner upon partnership funds, may be enforced in other courts, where proceedings for that purpose have been instituted before the commencement of the proceedings in bankruptcy. Having obtained lawful jurisdiction over the parties and subject matters, they have the right to determine all questions, as they arise, according to law, subject to the final judgment of the Supreme Court of the United States, in case any right or claim is set up under any statute of the United States, and such right or claim is denied by them."—See same author, 177; *Peck v. Jenness*, 7 Howard, (Sup. Ct. U. S.,) 612; *In re, Hugh Campbell*, 1 Am. Law Times Reports, 30; *Samson v. Burton*, 4 B. R., 1; *Bates v. Tappan*, 3 B. R., 159; 99 Mass., 376; *Bowman v. Harding*, 4 B. R., 5; 56 Maine, 559; *Stoddard v. Locke*, 43 Vt., 574.

In the cases at bar the plaintiffs debts do not appear to be disputed. But in order to ascertain the amount of the several debts and the amount of the attachment liens it was necessary to prove the debts. The Code of this State chapter one hundred and six, section nine, provides that the plaintiff shall have a lien on the property on which the attachment is levied from the time of the levy. Other sections of the same chapter provide for the sale of the attached property and application of the proceeds thereof, to the attachment debts. The Bankrupt Act of 1867, does not destroy, but preserves, liens acquired prior to the filing of the petition in bankruptcy, including execution liens acquired by levy, not procured or suffered by the debtor to be sued out and levied with intent to give a preference to the execution creditor. In the case of *Wilson v. City Bank*, decided by the Supreme Court of the United States, reported in 17 Wall. 473, it was decided that "something more than pas-

sive non-resistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property where the debt is due and he has no defence. In such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor, or to defeat the operation of the bankrupt law. Though the judgment creditor, in such case, may know the insolvent condition of the debtor, his judgment and levy upon his property are not, therefore, void, and are no violation of the act. A lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy, though commenced within four months after levy of the execution or rendition of the judgment.

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The said thirty-fifth section of the Bankrupt Act applies to attachment liens as well as execution liens.

The petition to declare the defendants bankrupt, as a firm, was not filed within four months from the levy of either of the attachments, and they each became liens from the time they were levied.

In the cases at bar the assignee does not pretend, in his petition, that the attachment liens were procured or suffered by the debtors or either of them to give a preference to the attachment creditors over other creditors; nor does he allege or state any fraud in any way or any lien on the moneys, &c., then in the custody of the court; nor does he state what part of the property levied on, if any, he claims, nor what money or effects of B. G. Warthen is in the hands of the sheriff, &c., under the attachments; nor does he ask to be permitted to be made a defendant to the attachments or dispute the debts or any of them, in whole or part; but he simply says to the court, in his petition, that B. H. Warthen & Bro., were declared bankrupt and that he was appointed assignee of B. G. Warthen, one of said bankrupts, and is thereby entitled to the moneys and effects of the said B. G. Warthen in the hands of the sheriff and constable, and



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under the control of the court for which he has received an assignment from W. W. Forbes, Register in Bankruptcy which he prays may be delivered over to him and that the attachments may be dissolved. Admitting the substance of all he states in his petition and he plainly has no right or claim to the money or any part thereof, as against the attachment creditors. He seems simply to claim that because of his being assignee of one of the bankrupts, with an assignment of a Register in Bankruptcy as to that bankrupt, it destroys the attachments and their liens, and entitles him to demand and receive the money.

There was no error in the circuit court refusing to allow said petition to be filed, of which the assignee can complain here at this time, as he showed no valid claim to the money or any part thereof in exclusion of the attachment creditors. The twenty-first section of the of the bankrupt act applies to cases where the personal liability of the debtor is sought to be fixed and ascertained by final judgment pending the determination of the question of his discharge. The object of the stay is to give time for putting into action the permanent bar to the debt. Bump on Bankruptcy, 166, 167, 168. In other words it is to enable the bankrupt to obtain and plead his certificate of discharge in bar to a personal recovery against him. But the certificate in bar of the debt would not discharge the property attached or the proceeds thereof from being applied to the debts, by the court, by virtue of the attachment liens—the court would in such case give judgments *in rem* and not *in personam*, as was done by the court in these cases. In other words, if the defendants had been discharged from their debts and obtained certificates thereof and plead the same instead of asking the stay of further proceedings to await the determination of the court of bankruptcy in Virginia, as they did, the effect of the plea would only have been to defeat a personal judgment against them for the

debt, and would not have discharged the attachment liens or prevented the court from rendering judgment *in rem* as to the attached effects, or the proceeds of the sale thereof, for the payment of the attachment debts. The defendants had no right to ask a stay of proceedings against the money, in the custody of the court, subject to the attachments. They could only ask a stay of proceedings against them personally, for a reasonable time, to allow them to obtain discharges in the bankrupt court. To proceed *in rem* against the proceeds of the sale of the property could in no way prejudice them. They therefore asked too much of the court. The motion was too broad. But the court in fact did grant the defendants all they should have asked, in not rendering a personal judgment against them, but judgments *in rem* only. It would doubtless have been error in the circuit court to have rendered personal judgments against the defendants, at the time they rendered the judgments *in rem*.

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Under the circumstances the circuit court committed no error to the prejudice of the defendants of which they can complain in this Court, at this time. If the assignee had moved the court to be made defendant to the actions or the attachment, or to make defense thereto, and the court had refused the motion or application, it is possible, though I do not now determine the question, that his proper remedy might be by *mandamus*. *Cannon v. Welford*, 22 Gratt., 195.

For these reasons the judgment of the circuit court of Greenbrier county in each of these cases, must be affirmed with costs and \$30 damages to the appellees respectively, in each case. And the causes are, respectively, remanded to the said circuit court for further proceedings according to law.

The other Judges concurred.

JUDGMENTS AFFIRMED AND CAUSES REMANDED.

## WHEELING.

## NATIONAL BANK v. NATIONAL BANK.

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1. Telegraphic dispatches are not privileged communications, but may be called for and given in evidence, whenever, in the opinion of the court, they are regarded as proper or competent testimony.
2. A dispatch, or the copy of a dispatch, purporting to have been written and sent by A B, as cashier, to C D, cannot be read in evidence, without first proving that it is a genuine paper, that is, that it was written and sent by the party whose name it bears.
3. The act of Congress passed the 3d day of March, 1869, making it unlawful for a national bank to certify checks, unless the drawer has, at the time, an amount of funds on deposit in said bank equal to the amount specified in the check, does not invalidate an oral acceptance of a check, or an oral promise to pay a check, there being at the time sufficient funds of the drawer in possession to meet it.
4. The said act of Congress does not invalidate a conditional acceptance of a check by a national bank having no funds of the drawer in its hands at the time, but that it will pay the same whenever a draft, left with it for collection by the drawer, and sufficient in amount for the purpose, shall have been paid.

Writ of error and *supersedeas* granted on the petition of the First National Bank of Wheeling to reverse a judgment of the circuit court of Ohio county, and award a new trial, in a suit therein pending, wherein the Merchants' National Bank of Wheeling was plaintiff, and said First National Bank of Wheeling defendant.

So many of the facts as are deemed material appear in the opinion of the Court.

The Hon. John Blair Hoge, judge of the third judicial circuit, presided at the trial below.

*C. W. B. Allison* for the appellant.

*Daniel Lamb* for the appellees.

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PAULL, JUDGE:

This was an action of assumpsit brought by the plaintiff, on a check of which the following is a copy:

"WHEELING, W. VA., 24th Feby., 1871.

First National Bank of Wheeling,

Pay to S. Brady Esq., Cas., or bearer fifteen hundred dollars.

\$1500.

A. C. QUARRIER, Treas."

There are two special counts in the declaration; the *first* setting forth the drawing of the check, and its presentation to and acceptance by the defendant, in consideration whereof the defendant undertook and promised to pay the plaintiff the amount thereof.

The *second* special count recites the making of the check; that the same was presented to defendant for acceptance, and that defendant promised to pay said check, as soon as it received information that a certain draft, of the Savings Institution of Wheeling, of which it was proved the said Quarrier was treasurer, upon — of Alleghany county, Pennsylvania, had been paid, which last mentioned draft had been placed in its hands for collection; that defendant received information that said draft so left with it for collection had been paid, and the amount of, exceeding \$1,500, was in fact paid to defendant, whereby it became liable to pay to the plaintiff the said sum of \$1,500. The declaration also contains the usual common counts. With the declaration an account was filed for the amount of said check, which not being paid, was duly protested.

The plaintiff demurred to the second special count in the declaration, in which there was a joinder by the defendant; and also filed the plea of non assumpsit. No action seems to have been had upon the demurrer, by the circuit court, but as there is no exception or complaint

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disclosed by the parties on that account, we do not propose to take any notice of that fact.

At the May term of the circuit court, 1873, a jury was empannelled to try the issue, and rendered a verdict in favor of the plaintiff for \$1,705: A motion for a new trial was made by the defendant, for the reasons assigned in the record, and for the matters set forth in defendant's bills of exception; this motion was overruled by the court, and judgment entered on the verdict; and from this action and judgment of the court, an appeal is now taken.

We now proceed to notice the grounds of the appeal, so far as it may seem proper or material for a right decision of the cause.

And *first*, the defendant excepted to the introduction of the testimony of John Morgan, Jr., the manager of the Western Union Telegraph office in the city of Wheeling who was asked to produce two specified telegraphic dispatches sent and received through said Telegraph Office, the first being a dispatch from the defendant's cashier, to J. D. Scully, the cashier of the First National Bank of Pittsburgh, in relation to the bill of exchange mentioned in the declaration, and which was alleged to have been paid; and the other being said Scully's reply thereto. It was objected that these were privileged communications; and that the second was not an original paper.

We are not prepared to approve the doctrine that has been advanced that telegraphic communications are privileged from disclosure, when a court shall have decided that they are proper testimony to promote the ends of justice. They are not necessarily confidential in their character, and if they were, they would not merely, for that reason, be protected. Letters passing through the mails are protected by act of Congress from being seized and opened for the purpose of furnishing testimony: They are protected for reasons of high public

policy. But no such legislative enactment, state or national, shields the communications by the telegraph; the adoption of the principle would limit the field of inquiry after truth, in the investigation of human affairs, and would be introducing a new class of privileged communications unknown to the common law. When the legislative power can be so easily invoked, if reasons of sufficient moment can be made to appear for the purpose, it may be wiser and better for the courts to refrain from such a line of decision.

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We think the objection made to the second communication, to-wit: that of John D. Scully to George Adams, defendant's cashier, well taken. There was no evidence before the court or jury whatever, that that was a genuine paper; that is, that it was written and sent by the party whose name it bears, and that he was the cashier of the Pittsburgh bank—material facts which must first be established, before the dispatch could be introduced as testimony. The evidence was incompetent and illegal, and its admission by the court erroneous.

The next ground of exception taken by the defendant, is to the instruction given by the court to the jury, at the instance of the plaintiff.

As we understand the evidence, that instruction, taking the first part in connection with the modification thereof, as given by the court, and designed as an independent instruction, is irrelevant to the issue before the jury, and should have been refused. It was to the following effect; that if the jury find that the acceptance of the check, if any, made by the defendant, was conditional, and that such acceptance was withdrawn or countermanded, at such time, and in accordance with such usages between the parties, as that checks, which had been accepted and paid by either party, could be returned, or the acceptance countermanded, and as a consequence, as we interpret the instruction, that no loss or damage could result from such withdrawal, the jury should find

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for the plaintiff. With this understanding of the effect of the instruction, we do not think it was erroneous.

The *third* exception of the defendant is to the rejection by the court of the *three* instructions asked for, on its behalf, and which involve an application of the act of Congress, of March 3, 1869, in reference to certified checks. The act is very brief, and simply makes it unlawful for any officer of a bank to certify a check, unless the drawer has funds on deposit, at the time, equal to the amount specified in such check; and after declaring such check good, affixes a penalty for the violation of the act, subjecting the bank to the action of the government. With this act in view the defendant asks the court to instruct the jury, *first*, that in order to maintain the plaintiff's action, the jury must find, from the evidence, that the check sued upon was accepted, or certified, in writing. The instruction was refused, and we think properly. Can it be successfully maintained, and should it be established as a fixed principle, that because a statute prohibits, (to give it the greatest effect that can be claimed by defendant,) a bank from certifying a check, when the drawee has not in its possession an amount of funds equal to the amount specified in the check; that, therefore, a verbal acceptance or promise made, on its behalf, by a proper officer, to pay a check, when the drawer has an amount of funds in possession of the bank, sufficient for the purpose, is null and void, and cannot be enforced? We assume here, without argument, that it is sufficiently established, by both English and American authorities, that the conditional acceptance of a check, as also the oral acceptance of a check, or the oral promise to pay a check, are valid, and can be maintained. Because the bank must not in writing certify a check, when there are no funds of the drawer in its possession, therefore it shall not verbally agree to pay a check when there are funds in possession sufficient for the purpose; for this, at least, is implied in such an argument. This

would seem to be giving a strained and improper effect to the act of Congress.

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The *second* instruction asked for involves the same mode or principle of construction. It recites that if the jury find that the check sued on, and given in evidence by the plaintiff, was taken by the plaintiff from the defendant, with the understanding that there was then no money of the drawer of the check, on deposit, in defendant's Bank, to pay the same, and that it was to be paid out of the proceeds of a claim of the drawer in the hands of the defendant, at Pittsburgh, and not yet collected or matured, and that the acceptance by the defendant, if any was made, was conditional upon the future collection or payment of such claim, then the plaintiff is not entitled to recover in this action. We think this instruction was properly refused. Because the act of Congress prohibits a bank from certifying a check, when the drawer has no funds, why should that invalidate a promise on its part, to pay a check, when the drawer shall have funds for the purpose, in its possession? This is but acting in accordance with the spirit of the act itself, refraining from making any promise, which is operative, until the bank is in the condition contemplated by the act. It is not seen how any interests of the bank are endangered by pursuing this course—Indeed such a promise seems to be implied in the very existence of the bank, and the nature of the business it transacts. It says to the public and customers, by the very laws of its being, I will pay all checks drawn upon sufficient funds of the drawer, in my possession, and such is its legal and moral obligation.

The *third* instruction involves the liability of the bank on an accepted or certified check, when the drawer had not funds in its possession equal to the amount specified in the check. We think this question does not arise upon the record. It does not present a state of facts to which the instruction can be applied. The claim of the plaintiff rests wholly, so far as the evidence indi-



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ates, upon a conditional acceptance, if there was any acceptance whatever; giving the plaintiff the benefit of the evidence, in its strongest form, as stated by its principal witness, and it proves that the check was accepted to be paid only when the Pittsburgh draft should have been paid, and the defendant had no offsets. There is, therefore, no absolute certified or accepted check, given when there were no funds sufficient to meet it in the hands of the bank, presented for our consideration in this controversy; and it will be better, perhaps, to postpone a decision upon the validity of such a check, until the question is fairly presented.

The *fourth* instruction recites, if the jury find that the defendant did not accept the draft sued upon, and given in evidence by the plaintiff, either unconditionally or upon the single condition alleged in the declaration of the plaintiff, but did accept the same with conditions other, (or additional) than as set out in the declaration, the plaintiff cannot recover in this action. It is certainly true, that if the plaintiff proves another and substantially different contract than that upon which he declares, as a general rule, the variance will be fatal. This seems to be the effect of the instruction in question, and to it there seems no valid objection.

The only question remaining to be determined arises on the motion for a new trial, and which was overruled by the court. The grounds for this motion, as they stand connected, with the instructions given or refused by the court, have been already considered. The only remaining ground is connected with the evidence. The verdict is claimed to be against the evidence.

How far an appellate court will interfere in a question of this kind, may depend very much upon the frame of the bill of exceptions to the decision of the court below for a new trial. In the case of *Bennett v. Hardaway*, 6 Munf., 125, the court expressed its views as to the proper frame of such a bill, and declares that it should not state all the evidence given to the jury on the trial, but only the

facts appearing to the court to have been proved by the evidence. It was not regarded as competent for the appellate court to review and reverse the opinion of the court below, on a question touching the weight of the evidence and credit of the witness, and that if this were otherwise, it would have to do so "in the dark, or at least with lights inferior to those possessed by that court." But when the facts only are stated, it is competent for the appellate court to review and reverse the opinion of the court below founded on those facts; by doing which it does not depart from or overrule the decision of the latter court, as to the weight of testimony, or the credit due to any witness, nor bring the whole matter again into controversy. See judge Baldwin's opinion in *Patterson v. Ford*, 2 Gratt., 18, where the case of *Bennett v. Hardaway* is reviewed and sustained, and which has been recognized in all subsequent cases. He further says that a bill of exceptions is not properly taken, unless strictly confined to the facts proved by the evidence; for if any opening is left, by the introduction into it of evidence, as contradistinguished from the facts, the supposition that the cause may have turned before the jury upon the credit and weight of the evidence, and so have furnished room for the discretion of the court, the appellate forum will not interfere with what may have been an exercise of that discretion. To do so, would, he apprehends, much impair the value of jury trials.

Upon examining the bill of exceptions in the case before us, we find that it is of a mixed character; it certifies facts which were proved, and also certifies the evidence of the chief witnesses, as taken down, apparently, at the time of the trial, and which is spread out in the record. The jury passed upon the whole of the evidence, some of which is conflicting, as connected with the origin, at least, of this transaction. While citing these authorities, however, as to what has been heretofore regarded as the form and effect of bills of exception, the rule applicable to the case, as the evidence appears in the bill

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of exceptions now before us, will be found in the case of *Carrington v. Goddin*, 13 Gratt., 587, where it was held, on a bill of exceptions to the refusal of the court to grant a new trial, because the verdict was contrary to the evidence, the evidence and not the facts proved, is stated; the court will reject all the parol evidence of the exceptor, and give full faith and credit to all the evidence of his adversary; and will not reverse the judgment, unless it then appears to be wrong. In applying this rule, it will only be necessary to refer to a single particular. The plaintiff's right to recover, depended upon satisfactory proof of the payment of the Pittsburgh draft. The acceptance and payment of the check sued upon, was made conditional upon this fact, and it must, therefore, be fully established, by competent testimony. We find little or no testimony in the record tending to establish this indispensable fact, but the telegraphic dispatch purporting to have been sent by J. D. Scully of the Pittsburgh bank. But, as we have heretofore seen, this testimony is incompetent, and its introduction erroneous. Excluding this testimony, and there is no proper or stable foundation, on which the verdict of the jury can rest. It then appears to be wrong, and the judgment founded upon it erroneous.

It was error therefore in the circuit court to refuse to grant the motion for a new trial, and the judgment rendered on the 2d day of June, 1873, is reversed, and the verdict set aside, with costs to the appellant, and this case is remanded to the circuit court of Ohio county for a new trial to be had therein, in accordance with the principles herein set forth.

The other Judges concurred.

JUDGMENT REVERSED AND CAUSE REMANDED.

## WHEELING.

## LYNCH v. HOFFMAN.

July 13, 1874.

In a suit at law, in which an attachment was sued out and levied on property of the defendants, and judgment obtained therein against the defendants, on publication, one of the defendants appeared in the court in which the judgment was rendered, within five years from the rendition of the judgment, and tendered to the court his petition, praying for a re-hearing of the proceedings in the action, without accompanying the petition with the affidavit prescribed and required in such case by the act of the Legislature passed the 11th of February, 1865, entitled "An act to amend and re-enact sections twenty-three, twenty-seven and twenty-eight of chapter one hundred and fifty-one and section thirteen of chapter one hundred and seventy of the Code of Virginia;" which affidavit, so prescribed, is commonly known and called "The Suitor's Test Oath." The court rejected the said petition and refused to allow it to be filed:—HELD.

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1. That it was error in the circuit court to reject and refuse said petition on the ground that it was not accompanied by such affidavit or test oath.
2. So much of the said act of the Legislature as prescribes such affidavit or test oath, is contrary to the Constitution of the United States, and to the Constitution of the State of West Virginia, and therefore null and void, from the passage thereof.
3. The petition for a re-hearing, tendered to the circuit court in this case, is sufficient in substance and form, and should be received by the court below, and ordered to be filed; and the court further to proceed in the same, as justice requires and the law directs.

Appeal, by Peter B. Righter, from a judgment of the circuit court of Harrison county, rendered on March 25, 1864, and from an order of the same court made on June 4, 1868.

The plaintiffs below were James Lynch, Josiah W.

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Lynch, John P. Lynch, Peter J. Lynch and Washington G. Reynolds, partners trading under the firm name of J. & J. W. Lynch & Reynolds, and the defendants, Peter B. Righter, John S. Hoffman, Joseph Snider and John T. Peerce.

The other facts sufficiently appear in the opinion of the Court.

The Hon. Thomas W. Harrison, then judge of said circuit court, presided at the trial below.

*Caleb Boggess*, for the appellant.

There was no appearance for the appellees.

HAYMOND, PRESIDENT:

This is an action of trespass in the case brought in the circuit court of Harrison county, by the plaintiffs against the defendant Righter and others, on the 31st day of December, 1863. Attachments were sued out in the action by the plaintiffs against the property of the defendants, one of which attachments was directed to the sheriff of Marion county, and was by his deputy, as appears from the record, levied on a tract of land of said Righter, lying and being on Koon's Run, in Marion county, containing two hundred and thirty-five acres, on the 22d day of January, 1864. The cause was proceeded in, to verdict and judgment against the defendants therein, to-wit: John S. Hoffman, said Peter B. Righter and Joseph Snider. The verdict and judgment in the cause were rendered on the 25th day of March, 1864, for the sum of \$3,450 damages. No order of sale was ever made touching any of the property on which either of the attachments were levied.

Afterwards, at a term of the circuit court held for said county of Harrison, on the 19th day of March, 1868, the said Righter tendered his petition to the court, praying for a re-hearing of the said cause. No service of any process in the cause was ever made, or had, against either of the defendants except by publication.

Whether the publication was properly made or not, we do not now determine, as it is not necessary or proper at this time.

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The petition of said Righter is set out at large in the record, and it appears to be sufficient in form and substance. Appended to said petition, are two affidavits of said Righter, made by him before James P. Bartlett, a justice of Clark township, in said county of Harrison, on the 18th day of March, 1868. By one of the affidavits, said Righter made oath that the said petition "*is true*," and that "he will support the Constitution of the United States, and the Constitution of West Virginia, and that he takes such obligation freely, and of choice, without any mental reservation or purpose of evasion." And by the other affidavit, filed by Righter with his petition, he made oath that he could not take and file with his petition the affidavit described and mentioned in the twenty-seventh section of chapter one hundred and fifty-one of the code of Virginia, as amended by the twenty-ninth chapter of the acts of the Legislature of West Virginia, passed the 11th day February, 1865, without thereby swearing falsely. The petition, so verified by the affidavit of said Righter, distinctly states that at the commencement of the rebellion, existing on the 11th day of February, 1865, he resided in the county of Marion, in the State of Virginia, now West Virginia, and that he resided there at the time of the rendition of said judgment, and that he claimed to be a citizen of West Virginia.

At a term of the circuit court of said county of Harrison, held on the 4th day of June, 1868, the court having consider the petition of said Righter, presented to the court at its last previous term, to re-hear the proceedings in said action of trespass on the case, in which there was a judgment, as aforesaid, in favor of the plaintiffs, against him and others, as aforesaid, and the affidavit by which the petition was verified and accompanied, as well as the motion of said Righter to file the same,

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the court refused to allow the said petition to be filed, or to award a summons against the plaintiffs, commanding them to show cause, if any they could, why the said Righter should not be permitted to make defence against the said judgment, and rejected the said petition, because the same was not accompanied by the affidavit by which "an act to amend and re-enact sections twenty-three, twenty-seven and twenty-eight of chapter one hundred and fifty-one, and section thirteen of chapter one hundred and seventy of the code of Virginia," passed February 11th, 1865, it is directed that such petition shall be accompanied; that the party never did certain acts therein mentioned. To this opinion and judgment of the court, said Righter excepted, and his exceptions are signed sealed and made a part of the record in due form.

The said Righter, in August, 1869, filed his undertaking, with security, and appealed from the judgment and orders of the circuit court of Harrison county, made in the cause at the March term, 1864, and in 1868 overruling his motion to file said petition.

The appeal in this case, as far as it relates to the said judgment rendered on the 25th of March, 1864, is improperly taken, because the defendants were proceeded against and the judgment had on publication, and, generally, the proper remedy of the defendants, or either of them, under the law, was to file, or offer to file, his, or their, petition in the circuit court, within the period prescribed by law, in such cases.

But the appeal in so far as it relates to the judgment and order of the court in rejecting said petition for a re-hearing and refusing to allow the said Righter to file the same in said case, &c., is well taken and must be entertained and determined by this Court.

The affidavits verifying and accompanying the petition contain, substantially, all that is required in such cases, by the provision, of the act to amend and re-enact sections twenty-three, twenty-seven and twenty-eight of

chapter one hundred and fifty-one and section thirteen of chapter one hundred and seventy of the Code of Virginia, passed by the Legislature of West Virginia on the 11th day of February, 1865, except so much thereof as requires the petitioner to take or make the oath therein prescribed which is commonly known and called "The Suitor's Test Oath ;" and it is evident from the concluding sentence of the the order of court rejecting the petition of Righter, aforesaid, that the court did, in fact, reject the petition, because it was not accompanied by such test oath.

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This appeal has been pending in this court since 1869.

We are of opinion that so much of said act of the Legislatnre of West Virginia as prescribed and required the petitioner for a rehearing to take, or make, so much of the oath as is prescribed in said act and is commonly known and called the Suitor's Test Oath was, at the time of the passage thereof, and always afterwards, contrariant to the provisions of the Constitution of the United States and of this State ; and this court has heretofore so held and determined in the case of *Kyle v. Jenkins*, 6 W. Va. 371, and *Ross v. Jenkins*, *infra*. See also *Cummins v. State of Missouri*, 4 Wall. (Sup. Ct. U. S.) 320 ; *Ex-parte Garland*, Id. 333.

For these reasons the appeal taken in this cause so far as it relates to the judgment of the said circuit court of the 25th day of March, 1864, must be dismissed, but without prejudice ; and the judgment and order of the said court made on the 4th day of June, 1868, rejecting the said petition of said Righter for a rehearing of the said cause, &c., must be reversed and the appellant recover against the appellees J. & J. W. Lynch & Reynolds, his costs here expended.

And this court proceeding to give such judgment as said circuit court should have given, this case must be remanded to the said circuit court of Harrison county, for further proceedings, with directions to allow and permit the said petition of said Peter B. Righter for a rehearing



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of the case, &c., to be filed and to cause proper process to be issued therein to the plaintiffs in said action and such other and further proceedings to be had upon said petition and in said cause, as is prescribed by law, in such cases, and ultimately to grant the rehearing prayed for in said petition, unless legal and sufficient reason, other than any now appearing by the record, be shown, why the prayer of the said petition should not be granted, and further to proceed therein as may be just and lawful.

Paull and Moore, Judges, concurred.

Hoffman, Judge, did not sit, being a party defendant, on the record.

APPEAL DISMISSED AS TO JUDGMENT, of March 25, 1864.

JUDGMENT REVERSED AND CAUSE REMANDED AS TO ORDER OF JUNE 4, 1868.

## WHEELING.

## HOLLINGSWORTH &amp; Co. v. BROOKS.

July 13, 1874.

The Supreme Court of Appeals decided, in this cause, that the circuit court had no right to make a decree to rent the land of the defendants, without their consent, for the year 1871—the circuit court not having first determined, by its decree, that there was a lien or liability upon the said land, or the rents and profits thereof, for the payment of some debt or liability.—HELD:

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1. As the legitimate effect of said decision, that a similar order, directing the land to be rented for the previous year of 1870, is, for the same reason, erroneous, and when coming in conflict with the rights of said defendants, as subsequently settled by said decision of the Supreme Court of Appeals, must be regarded as of no validity.
2. That it also follows, as a legitimate consequence of said decision, that the circuit court may properly make an order directing the rents, or the notes or bonds taken for the same, for the year 1870, to be paid or delivered to the parties entitled to the rightful possession of said property or land during that year—said order being based upon their petition filed in court.

An appeal, by John Slack, administrator of R. M. Malcom, Charles Hedrick, administrator of L. Wilcox and Benjamin S. Smithers, administrator of William Shrewsbury, from a decree of the circuit court of Kanawha county, rendered on the 9th day of November, 1872.

The complainants below were Hollingsworth & Co., a firm that long since ceased to exist, and several other firms that have likewise ceased to exist and the respondents William C. Brooks and others—whose names it is not necessary to here set forth. Such material facts as are necessary to understand the decision of this Court are stated in the opinion of Paull, Judge.

The Hon. James W. Hoge, judge of said circuit court presided at the hearing below.

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*Mollohan & Nash, James M. Laidley and James H. Ferguson, for the appellants.*

*Smith & Knight and Samuel A Miller, for appellees.*

PAULL, JUDGE:

The defendants, William C. Brooks, William A. Brigham and Stuart Robinson, were, on the 5th day of January, 1855, jointly seized of certain valuable salt property, consisting of real estate situated in the county of Kanawha, on which were located coal banks, wells, furnaces, houses, railroads, and other improvements used in the manufacture of salt; they were also possessed, jointly, of certain personal property, consisting of stock used in connection with the aforesaid real estate, and also of certain negroes. Being thus seized and possessed of the above named property, the three parties above named, did, on the 5th day of January, 1855, enter into an article of agreement, or instrument of writing, under their hands and seals, dated on the day and year last aforesaid, by which, (among other things,) "they agreed to *surrender, and did surrender, the possession of all the above named salt property, both real and personal, unto the said William C. Brooks, for the term of five years, commencing on the 1st of January, 1855,*" in order to secure the speedy payment of the debts of "Brooks and Brigham;" the said agreement reciting that the same were incurred by them for improvements made upon said property, and for costs of running the same; and that said debts were created by them under the firm name of W. C. Brooks & Co.; that said possession was to continue for five years, unless said debts were sooner paid off, and the parties should desire that said arrangement should cease. In consideration whereof, the said William C. Brooks did agree and bind himself to take charge of said property, and to diligently work the same, in the manufacture of salt, and in such other ways, for which it may be deemed suitable, at his own proper costs and charges, and in his own name; and out of the net proceeds to first pay and satisfy to Mrs. Brigham, an annuity of \$1.500; and

next to pay to said Robinson the sum of \$1,000, and the residue to the discharge and satisfaction of the debts aforesaid, of Brooks and Brigham; if said debts were not paid, then the said Robinson agreed that all his interest in the property aforesaid, both real and personal, should be liable to the payment thereof, as fully as the property of the other parties therein shall be liable, but that said Robinson, himself, was not to be in any way responsible for the same, he only agreeing to bind the property aforesaid for the payment of said debts, and to charge his interest in the property aforesaid, with the debts of Brooks and Brigham, to the same extent in all respects, that Brooks and Brigham's property is liable, by law, and by the terms of said agreement. The said agreement further provided, that the said William A. Brigham should continue personally liable for the said debts of Brooks and Brigham, however changed they might be, or renewed, and be in the name of said Brooks, alone, and all his property bound therefor, and so to continue, until all said debts were paid, no matter how changed. And the said Brooks and Brigham, did, by said agreement, "charge all their property" aforesaid, with the debts aforesaid, as then existing, and in all their changes, until the same were actually extinguished, in their then, or future, form. These are the chief, and the only, provisions in said agreement that it is now necessary to notice. This agreement was admitted to record on the 6th day of January, 1855, in the clerk's office of the county court of Kanawha county.

To this agreement at the time it was made, there could be no proper or legal objection, or complaint. Mrs. Brigham, to whom the annuity of \$1500 was to be paid, was the owner, formerly, of a large part of said salt property, and had made a voluntary donation of the same by grant, unto the said William A. Brigham, her son, and to the said Stuart Robinson, and the said William C. Brooks, her two sons in-law, reserving an annuity of

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\$1500; and the said property was bound for the same in their hands, and its payment must be provided for. The said Robinson, while not owing any of the debts of said Brigham and Brooks, or being in any way liable for the same, while voluntarily subjecting his interest in said property to the payment of the same, had the right to do so, on such terms as he may have deemed just and reasonable. The creditors of Brooks and Brigham, whose debts were intended to be secured and paid by said agreement, were not bound to accept its provisions, but were at full liberty to renounce the same, and to sue for and recover their debts, by any other means, subjecting the interest of said Brooks and Brigham in said property, or any other, to the payment of the same. Of course creditors of said Brooks and Brigham, or of either of them, whose debts were not then in existence, can not complain of said agreement, or of the exercise or maintenance of any rights or benefits on the part of the defendants, to which they or either of them are legally or equitably entitled.

While the aforesaid property was in this condition, Hollingsworth & Co. and the other parties united with them, as plaintiffs, having subsequently obtained judgments against the said William C. Brooks, filed their bill in the circuit court of Kanawha county, in April, 1858, setting up the fact of said judgments, and the making of said agreement by the defendants aforesaid, and praying that said property, consisting of lands and negroes, so conveyed to said Brooks, be sold for the payment of their debts, and particularly of the debts of the plaintiffs. They do not directly allege, however, that they are creditors of Brooks and Brigham, or that their debts were of the class or number specified in said agreement, or which it was designed to secure.

Answers to said bill were filed by Mrs. Brigham, Robinson and Brooks, the said William A. Brigham having departed this life, and his interest in said property hav-

ing descended to his mother, the said Mrs. Brigham and his two sisters, the wives of said Robinson and Brooks, his heirs at law. It is not material to the present controversy to notice these answers, or the allegations in the bill to which they particularly refer.

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A large number of other parties, who subsequent to the making of said agreement became judgment creditors of the said William C. Brooks, filed their petitions to be made plaintiffs with the parties in the original bill, and that they may be permitted to share in the application of any funds or moneys, which may arise from any disposition which may be made of said property by renting or otherwise; but none of them alleging that they were creditors of Brooks and Brigham, or that their debts were of the class or number specified in said agreement, and whose payment it was designed to secure; while the petition of some of said parties represents the suit of Hollingsworth & Co., as "a general creditors' suit." The petition of some of said parties, which was filed at the November term, 1869, also resisted the public renting of said property at that time, alleging, as they believed, that it would be very injurious to the rights of all the creditors of said Brooks to rent said property in the mode above indicated, at that time.

In November, 1859, when the five years limited in said agreement was drawing to a close, the said William C. Brooks surrendered said property therein specified to the control of the court, so that it might be rented out, either until the rents may discharge the debts or all things are prepared for a sale, if any sale be found necessary thereafter.

At the November term of the court, 1859, an order was made, so far as it appears, without opposition from any quarter, directing the sheriff to rent said property for the year 1860; and by consent of the parties, the court subsequently continued, by its officers or agents, to rent the property up to the 1st of January, 1870. The rents and profits realized up to this time were not sufficient,

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after paying expenses, and the annual sums first directed to be paid by said agreement to leave any balance applicable to any other person or claims.

In the fall of 1869, it was proposed that said property be rented, at public auction, to the highest bidder, for the year 1870; but this proposal was resisted by the defendants. An order, however, was made by the court, at its November term, 1869, directing the property to be rented by commissioners appointed for that purpose, for one year from the 31st day of December, 1869; this was accordingly done, and the sum of \$20,250 was obtained as rent therefor, and notes and other securities were taken for the above amount.

By order of the court, made on the 8th day November, 1870, the said commissioners were again directed to rent said property for one year from the 1st day of January, 1871; but before this order was executed, the defendant Brooks filed his notice for an appeal therefrom; and an appeal was accordingly taken from said order or decree to the Supreme Court of Appeals. At a term of the Supreme Court of Appeals, held in August, 1872, the said order of the circuit court for renting said property, made on the 8th day of November, 1870, was held to be erroneous, and the same was annulled and reversed. Upon this decision being made, the said William C. Brooks and Lavinia, his wife, Stuart Robinson, and Mary E., his wife, Alethia Brigham, and Walter B. Brooks, claiming to be the owners of said property, filed their petition in the circuit court praying that the amount of rents received from said property for the year 1870, and then in the the possession or under the control of the court, or the notes or bonds, or other securities representing the same, be paid or handed over to them, the said petitioners claiming that the renting of said property for said year was without authority of law, and that they were legally entitled to the rents and profits which had accrued from said renting in accordance with the principles settled by the Supreme Court of Appeals. This prayer of the peti-

tioners was granted, and an order was made by the circuit court, on the 9th day of November, 1872, directing that the rents, or bonds taken for the same, for the year 1870, be paid or delivered to the petitioners, and that the annuity due to Mrs. Brigham, for that year, be paid out of the same. And now from this order, so made on the 9th day of November, 1872, by the circuit court, an appeal has been taken to this Court by the personal representatives of three of the deceased plaintiffs in this cause. Whether there is error in said order of the 9th of November, 1872, is now the question presented for our determination. There is no testimony in the record taken by any of the parties.

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With this history of the case, or so much thereof, as we have deemed it material to recite, we observe in the *first* place, that there has been no *express* adjudication by the circuit court, of the rights of the parties, either plaintiffs or defendants, under said agreement so made by Robinson, Brooks and Brigham, on the 5th day of January, 1855; nor has there been any express judicial construction of the same, notwithstanding the incidental use of such terms as "trust property," "trust debts," &c., in the pleadings of the parties, and in the orders and decrees of the court, when the use of such terms was obviously not designed to settle, in any way, the true meaning of said agreement. Neither has there been any express adjudication by said court, of the nature and extent of relief to which the plaintiffs and petitioning creditors in this cause are entitled, as against the property specified in said agreement. It may, however, be fairly implied from the order of said court, directing the renting of the property for the year 1870, against the consent of the defendants, that the court did regard these plaintiffs and petitioning creditors as being interested in the rents and profits thereof at that time.

We observe in the *second* place, that the above matters or questions have been in no way settled by the Su-



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preme Court of Appeals, except so far as they are fairly embraced within the operation of its late decision, to which reference has been made.

We observe in the *third* place, that said decision is in no way subject to review, in any further decision to be made in this cause, but is permanent and irreversible, settling the rights of the parties upon all questions properly coming within its purview or effect, and all legitimate consequences flowing therefrom.

We now proceed to notice the opinion of the Supreme Court of Appeals and its bearing upon the decision now to be made. The Court say, that "it is of opinion that the circuit court had no right to make a decree to rent the land of the defendants without their consent, not having first determined by its decree, that there was a lien or liability upon the said land, or the rents and profits thereof, for the payment of some debt or liability."

Now liens or liabilities upon real estate, or the rents and profits thereof, may be created either by the acts of the parties, as by their agreements, deeds or other instruments in writing; or they may result from operation of law, as by the judgments or decrees of courts. It is manifest that the Supreme Court of Appeals has not decided, whether the agreement of the defendants, filed as exhibit D., with the plaintiffs' bill, does or does not create a trust, or whether the judgments of the plaintiffs and petitioning creditors, do or do not bind the real estate of the defendants, or its rents or profits; nor to what measure of relief the plaintiffs are entitled, or how it is to be obtained, so far as the estate mentioned in exhibit D. is concerned. Moreover, it has not decided, whether the bill of the plaintiffs is filed by them as creditors at large, seeking the enforcement of specific judgments obtained by them respectively, or is filed by them to enforce the execution of a specific trust, created by the act of the defendants by virtue of said agreement D. These are questions which the opinion of the Court

has not touched or decided ; it has merely said that the circuit court has not declared, or determined by its decree, that there was a lien or liability upon the said land, or the rents and profits thereof, for the payment of some debt or liability, no matter how said debt or liability was created or originated, if existing at all ; and in the absence of any such decree, that the circuit court had no right to make a decree to rent the land of the defendants, without their consent.

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Upon any of the questions above stated, and remaining undecided, it is not now the province or duty of this Court to intimate any opinion.

On the other hand, the Supreme Court of Appeals has decided but one single question, to-wit: that until the circuit court has first ascertained or determined by its decree, that there is a lien or liability upon the land of the defendants, or upon its rents and profits, for the payment of some debt or liability, the court had no right to rent their land without their consent ; and hence the order to that effect made on the 8th day of November, 1870, was reversed and annulled. It necessarily follows, as an inevitable consequence, that the order of the court, directing the property or land of the defendants to be rented without their consent, for the year 1870, and which order was made on the 20th day of November, 1869, was also erroneous—the circuit court at that time not having determined that there was any lien or liability upon the land of said defendants, or upon its rents or profits. Said order illegally and wrongfully, in the judgment of the Supreme Court of Appeals, deprived the defendants of the possession of their property for that year ; and consequently of its use, or its rents and profits, to which said defendants were lawfully entitled, until said court had determined by its decree that there was a proper lien existing upon said land, or its rents and profits, for the payment of some debt or liability.

The decree of the circuit court made on the 9th day of November, 1872, simply restored to the petitioners

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therein named, and who were entitled to the possession of the property during the year 1870, the rents and profits of which they had been illegally deprived, by the previous order of the court, and to which they were consequently entitled.

It has been said that the order renting the property for the year 1870, was never appealed from, and was never set aside, either by the Supreme Court of Appeals or by the circuit court, and is therefore in full force. It may be safe to say, however, that all orders in said cause, determined by the effect of that decision of the Supreme Court of Appeals to be erroneous, are virtually reversed and annulled, when coming in conflict with the rights of any of the parties, as thereby ascertained. The decree restoring the rents made in November, 1872, was founded upon the petition of the parties therein named, filed in open court, and in this case, to-wit: the case of Hollingsworth & Co., and others v. William C. Brooks and others, and where the parties were all present either by person or counsel; no new process or summons directed to them would seem to have been necessary. But even if there was irregularity in the order at the time, or under the circumstances in which it was made, still the order does not prejudice the rights or interests of the appellants, they having no interest in the subject matter thereof, it having been previously ascertained by the highest authority, that the rents and profits belonged to the petitioners. In order to sustain an appeal, the party must show that he has sustained a wrong, or been aggrieved by the judgment or decree of the court, from which the appeal has been taken.

Under these views of the case, the decree of the circuit court, made on the 9th day of November, 1872, is affirmed with costs, and damages according to law, and this cause is remanded to the circuit court of Kanawha county, to be proceeded in according to the principles governing courts of equity.

The other Judges concurred.

DECREE AFFIRMED.

## WHEELING.

## LEFTWICH v. NEAL.

July 13, 1874.

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| 7  | 500 |
| 49 | 380 |
| 49 | 302 |

1. The certificate of a Recorder that a married woman, having been examined separate and apart from her husband, and having a writing fully explained to her, declared the same to be her act, and that she did not wish to retract it, is fatally defective—the words, “that she had willingly executed the same,” or words of equivalent import, having been omitted.
2. The defective acknowledgment of such deed cannot be aided or cured, by parol testimony. \*

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\*The following is so much of section four of chapter seventy-three of the Code of West Virginia referred to in the opinion of the Court as it is deemed necessary to here insert.

“4. When a husband and his wife have signed a writing purporting to convey real estate, she may appear before a Recorder authorized to admit such writing to record, in his office; and if, on being examined privily and apart from her husband by such Recorder, and having such writing fully explained to her, she acknowledge the same to be her act, and declare that she had willingly executed the same, and does not wish to retract it, such privy examination, acknowledgment, and declaration shall then be recorded by such Recorder in his office: or she may appear before a justice, notary public, recorder, prothonotary, or clerk of any court, within the United States, or a commissioner appointed within the same by the governor of this state, and such justice, notary public, recorder, prothonotary, clerk, or commissioner, may so examine her; and if, after such explanation, she make such acknowledgment and declaration, shall certify the same on or annexed to the said writing, to the following effect, to-wit:

“State (or territory or district) of ———, county of ———, to-wit: “I, ———, a commissioner appointed by the governor of the State of West Virginia, for the said state (or territory or district) or ———; [or, I, ———, a justice for the county aforesaid, and township of ———; or, I, ———, Recorder of the said county; or, I, ———, a notary public for the county aforesaid; or, I, ———, prothonotary (or clerk) of the ——— court of said county], do certify that ———, the wife of ———, whose names are signed to the writing above (or hereto annexed), bearing date on the ——— day of ———, personally appeared before me, in the county

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Appeal from, and *supersedes* to, a decree of the circuit court of Wood county, rendered on the 26th day of March, 1873, in a suit therein pending, wherein Lois A. Leftwich was complainant and James A. Leftwich, husband of said Lois, George B. Neal, trustee in a deed of trust purporting to have been executed by said James A. and Lois Leftwich, to secure Daniel R. Neal, in a certain sum therein named, and said Daniel R. Neal, were respondents. The appeal was taken by the complainant below.

The decision of the case, here, turned upon the validity of the acknowledgment of said deed, by said Lois, and as to admissibility of parol evidence to cure a defective acknowledgement of the same. So much of the record, and so many of the material facts, including the acknowledgement aforesaid, as are necessary to be stated, will be found in the opinion of the Court.

The Hon. James M. Jackson, judge of said circuit court, presided at the hearing below.

*Scott & Cole*, for the appellant.

*John A. Hutchinson, Jr.*, for the appellees.

PAULI, JUDGE:

On the 26th day of March, 1872, the plaintiff filed her bill in the clerk's office of the circuit court of Wood county, praying an injunction to restrain George B. Neal, the trustee named in a deed of trust purporting to have been executed by the plaintiff and her husband, James A. Leftwich, from selling the property therein conveyed, to secure the payment of a single bill, made by the said James A. Leftwich, and payable to Daniel

aforesaid (or, if it be a commissioner, in the state, territory, or district aforesaid (or, if it be justice, in the township aforesaid), and being examined by me privily and apart from her husband, and having the said writing fully explained to her, she, the said ———, acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it. Given under my hand, this ——— day of ———."

R. Neal of the city of Parkersburg. This deed of trust is dated the 6th day of March, 1865, and the property thereby conveyed is a lot of ground, with its appurtenances, situated in the city of Parkersburg. The bill alleges that the plaintiff was the owner of the lot of ground in her own right, before her marriage, and this allegation is admitted in the answer of defendant Daniel R. Neal. The bill further alleges that said deed of trust was executed by her husband, James A. Leftwich, but denies that the plaintiff executed, or acknowledged said deed. To said deed is affixed the following certificate, to-wit: "West Virginia, Recorder's Office, Wood county, March 6, 1865. I, George K. Leonard, Recorder for Wood county, hereby certify that James Leftwich, whose name is signed to the foregoing writing, bearing date from March 6. 1865, acknowledged the same before me in my office. And Lois Leftwich, wife of James Leftwich, whose names are signed to said writing, being examined by me separate and apart from her husband, and having said writing fully explained to her, she declared the same to be her act, and did not wish to retract it."

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Copies of numerous letters of the plaintiff, and also the depositions of witnesses, are found in the record, tending to show acknowledgments on the part of the plaintiff of the binding character or efficacy of said deed, upon herself. We have stated all of the pleadings and history of this case, that appears to be necessary to a proper determination of the questions arising upon the record.

Upon the 26th day of March, 1873, the case coming on to be heard upon the pleadings, exhibits and evidence, the injunction theretofore awarded in said cause, enjoining a sale of the property by the trustee, was dissolved until the further order of the court; and from this decree of dissolution, an appeal is taken to this Court.

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The *first* question presented for consideration is the sufficiency of the certificate appended to this deed of trust, to give it force and effect as the valid deed of the plaintiff. At the time of the execution and acknowledgement of this deed the provisions of the statute in relation to the deeds of married women, are the same as now found in our Code of 1869. .

The fourth and fifth sections of chapter seventy-three, prescribe the requisites to give validity to such deeds, and a substantial compliance with these provisions, is essential to enable a married woman to convey her interest in real estate, she having no power to make such conveyance at common law.

The *feme covert* is to appear before an officer authorized by said fourth section for the purpose, and who shall certify that she was examined privily and apart from her husband, and having the writing fully explained to her, that she acknowledged the same to be her act, and declared that she had willingly executed the same, and does not wish to retract it. Section five provides when the privy examination, acknowledgment and declaration of a married woman shall have been so taken and recorded in the Recorder's office, or when the same shall have been so taken and certified as aforesaid, and the writing to which such certificate is annexed, or on which it is, shall have been delivered to the proper Recorder and admitted to record, as to the husband as well as to the wife, such writing shall operate to convey from the wife her right of dower, or any interest she may have in real estate. It has been repeatedly held, by decisions in Virginia and Kentucky, and other states, that the foregoing certificate required by the statute, must be substantially, though not literally, complied with ; that if the same words used in the statute are not employed, that there shall be words of equivalent import, and that no requirement of the statute shall be omitted. Though the form of the certificate is given, if it is to the same effect, though not in the same words, it is sufficient. But the

certificate must show that everything was done which is required by the law to be done. *Hairston v. Randolphs*, 12 Leigh, 445. Judge Allen, in delivering the opinion of the court, says: "The statute points out a mode by which a valid conveyance may be made; it is an innovation on the common law, and its terms must be substantially complied with. By it the certificate must, in some form, show, not only that she acknowledged the conveyance, but that she willingly signed, sealed and delivered the same, and wished not to retract it, and that it was explained to her. The explanation is to be made that she may have knowledge of the contents; but if the acknowledgment implies consent, and consent implies knowledge, then the simple acknowledgment would have been sufficient, and the other requirements would have been superogatory." Again, "there is good reason for requiring a substantial compliance with all the requisitions of the statute." These declarations of the court in that case indicate that a compliance with one requirement of the statute, by no means implies a compliance with another. In this case of *Hairston v. Randolphs*, it was held, that the certificate was defective in not showing that the deed was explained to the wife, or that she was in any way apprised of its contents and purpose, and, therefore, the rights of the wife did not pass by the deed. In the case of *Todd v. Baylor*, 4 Leigh, 498, judge Tucker said, "Though we do not require the certificate to be in the express language of the law, neither do we dispense with any part of the law. We only consider the language, and, as if it was the very language of the law." In the later case of *Grove v. Zumbro*, 14 Gratt., 501, the certificate wholly omitted any declaration of the wife that she *wished not to retract what she had done*, and the omission was held to be material, and the certificate fatally defective. Judge Moncure says, "Her wish to retract what she had done is perfectly consistent with everything contained in the certificate. The law expressly required this declaration

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to be made and entered of record, and the requisition is very material." In the older Virginia cases, when a literal compliance with the statute was not insisted on, the court still held that there had been a substantial compliance with every requirement.

In the certificate now under consideration, the declaration of the wife that she had willingly executed the deed, is entirely omitted, but it does contain the words, "that she did not wish to retract it." The certificate recites that she declared the same to be her act, and this is required by the statute ; but this by no means implies a compliance with the additional requirement of the statute immediately following, to-wit : "and declared that she had willingly executed the same, and does not wish to retract it." If authority is needed on this proposition, it is found in *Blackburn's Heirs v. Pennington*, 8 B., Mon. (Ky.) 217. There the certificate showed that the grantors, including the wife, acknowledged the deed to be their act, and that she was privily examined. But the court held that this certificate must show that her acknowledgement was voluntary, and that it could not be inferred from the fact of her privy examination ; in other words, a certificate merely, that a deed was acknowledged to be her act, did not prove or show that it was a voluntary acknowledgment. And if, under our statute the fact that a certificate showing that a *feme* acknowledged a deed to be her act, does not imply a compliance with the further requirement of the statute that she willingly executed the same ; that these are in fact equivalent expressions ; no more, we think, does the fact that the words, that she did not wish to retract it, found in the certificate, prove or show, that she willingly executed the deed. We do not think that it can be necessarily inferred because a *feme* acknowledges that she does not wish to retract what she has done, that, therefore, she willingly executed the deed. The execution might have been at one period and under duress or coercion, while the acknowledgement that she did not wish to retract it,

is made at a subsequent time, and under different influences. It can not be said, at least, that this is impossible. But here is the express provision of the statute requiring her declaration that she willingly executed the deed and does not wish to retract it to be certified and recorded. The two phrases are connected by the copulative conjunction *and*, not by the disjunctive conjunction *or*; in the latter case they might have been construed as equivalent expressions, and the presence of the last might be construed as dispensing with that of the former. But the Legislature has expressly inserted them both, and both, or an equivalent for both, must be embraced in a certificate, to make the deed operative. This we think is essential, in order that we may not, in the language of judge Tucker, "dispense with any part of the law," and in the language of judge Allen, "there is good reason for requiring a substantial compliance with all the requisites of the statute." The Legislature does not seem to have regarded these phrases as being of the same import, and the rules of interpretation require that the courts shall give effect to every part of the act. It has been contended that the case of *Gill and Simpson v. Fauntleroy's Heirs*, 8 B., Mon. (Ky.) 177 authorizes a different effect or construction to the language used in this certificate, and decides that the phrase, "and does not wish to retract it," is equivalent to the language, "that she willingly executed the same." We observe, that we have not seen the Kentucky statute, but we infer from the language of the courts, in the cases we have examined, that their statute does not contain the provision in the same form as ours, requiring the certificate of two independent facts connected together. Moreover, the certificate in this case of *Gill & Simpson v. Fauntleroy's Heirs*, states other matters not embraced in ours, and the judgment of the court is founded, seemingly, upon them all. The court say: "the declaration that she did not wish to retract, is equivalent to a declaration that she wished the deed to stand as her deed; and she

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further evinces this desire by again acknowledging it, and consenting that it might be recorded. It seems to us that this should be regarded as tantamount to a declaration that she fully acknowledged the deed." We do not think this case, upon a careful examination, justifies the full effect which has been claimed for it, and can not, we think, be allowed to override an express requirement of our statute. Upon the whole we think the certificate is fatally defective, in the particular to which reference has been made.

The privy examination, acknowledgment and declaration of the *feme* must not only be certified, but duly recorded to make the deed operative. The sufficiency of the certificate can only be determined by an inspection of the record, and if the record does not disclose the fact that the requirements of the statute have been substantially complied with, the deed, as to the *feme*, is void. It has been claimed here that the letters of the plaintiff and other evidence found in the record tending to show that the plaintiff admitted the validity of the deed, should be considered by the court in this case. We think the testimony wholly inadmissible for the purpose. In the case of *Elliott v. Peirsol*, 1 Peters (Sup. Ct. U. S.) 328, it was expressly HELD that the privy examination and acknowledgment of a deed of *feme covert*, so as to pass or convey her estate, could not be legally proved by parol testimony. "What the law requires to be done and appear of record, says the court, can only be done and made to appear by the record itself, or an exemplification of the record." To the same effect is the case of *Barnett v. Shackelford*, 6 J. J. Marsh. (Ky.) 532. In that case the grantee in a deed filed a bill against a widow, who when a *feme covert* had executed and acknowledged a deed, to which there was a certificate affixed, but the acknowledgment or certificate was defective, and it was sought to cure the difficulty by the aid of parol evidence. The court say: "Parol evidence is not sufficient; it can only be proved by the record. If parol evidence

should be admitted to establish it, then an acknowledgment by a *feme covert* before witnesses, *in pais*, when aided by the character would be as good as an acknowledgment before the officer designated by law, and making up a record thereof in the manner prescribed; and thus the guarded provisions of our statutes might be substituted by a new branch of equity jurisdiction." See also *Prewit v. Graves*, 5 J. J. Marsh. (Ky.) 114. Upon authority and principle parol evidence cannot be admitted, and the deed of the plaintiff, in the bill mentioned, must be held and declared void as to her.

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It has been claimed that it would be inequitable, under the evidence contained in the record, to give the relief to the plaintiff claimed in her bill. But we apprehend that unless positive fraud, on her part, in the procurement of this loan, for which her husband's note was given, should be established, as entering into the original transaction, she cannot be estopped from repudiating this defectively acknowledged deed. Bigelow on Estoppel, pp. 488-9 and 90. And even fraud in Massachusetts has been held insufficient for this purpose. See 10 Cush. 276.

The decree of the circuit court made in this case on the 26th day of March, 1873, is reversed and annulled, with costs to the appellant, and this Court proceeding to enter such decree as the court below should have entered, doth adjudge, order and decree, that the deed mentioned and described in the bill and proceedings be, and the same is, hereby declared null and void as to the plaintiff, and that the trustee therein named be perpetually enjoined and restrained from selling any estate or interest in the lot or property in said deed, bill and proceedings mentioned and described.

The other Judges concurred.

DECREE REVERSED AND INJUNCTION PERPETUATED.

## WHEELING.

## LYNCH v. HOFFMAN.

July 13, 1874.

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In a suit in equity to enforce an alleged judgment and attachment lien, alleged to have been acquired in a proceeding at law against lands of the defendants to the alleged judgment and attachments, the defendants H. R. and S., to the bill and the said judgment and attachment, are proceeded against as non-residents of the State, and by publication. The alleged judgment is, by the court, by its decree, declared to be a lien upon the lands of R. and S., and the lands of R. and S., are, by the court, decreed to be sold to pay such judgment; and commissioners appointed by the court, for the purpose, sell two tracts of land of R., to the plaintiffs, and make report of the sales to court, and the court confirmed the sales and directed deeds to be made to the purchasers for the lands; and also decreed the disposition of a large part of the purchase money, for the benefit of the plaintiff. R., whose lands had been so sold, appeared in the court in which the decrees were rendered, within five years from the rendition of each of the decrees, and tendered to the court his petition for a rehearing of the proceedings in the cause without accompanying the petition with the affidavit prescribed in such case by the act of the Legislature, passed the 11th day of February, 1865, entitled "An act to amend and re-enact sections twenty-three, twenty-seven and twenty-eight of chapter one hundred and fifty-one and section thirteen of chapter one hundred and seventy of the Code of Virginia," which affidavit, so prescribed, is commonly known and called "The Suitor's Test Oath." The court rejected said petition, and refused to allow it to be filed.—  
**Held:**

1. That it was error in the circuit court to reject and refuse said petition on the ground that it was not accompanied by such affidavit or test oath.
2. So much of the said act of the Legislature as prescribes such affidavit or test oath is contrariant to the Constitution of the United States, and the Constitution of the State of West Virginia and therefore invalid, null and void from the passage thereof.

3. The petition for a rehearing tendered to the circuit court in this case is sufficient in substance and form, and should be received by the circuit court and ordered to be filed, and the court further to proceed upon the same, and in the cause, according to law and the practice and rules of courts of equity in such cases.

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Appeal, by Peter B. Righter, from certain decrees or orders of the circuit court of Harrison county, entered on the 10th day of December, 1864, the 17th day of March, 1865, and the 4th day of June, 1868, in a suit in chancery therein pending, wherein James Lynch, Josiah W. Lynch, John P. Lynch, Peter J. Lynch and Washington G. Reynolds, partners in trade under the firm name of J. & J. W. Lynch & Reynolds, were complainants and John S. Hoffman, said Peter B. Righter, Joseph Snider, Elmore H. Snyder, Isaac N. Cox and Sarepta Cox, his wife, Festus P. Snyder and Altha Snyder, were respondents.

The other facts appear in the opinion of the Court.

The Hon. Thomas W. Harrison, then judge of said circuit court, presided at the hearing below.

*Caleb Boguess*, for the appellant.

There was no appearance for the appellees.

HAYMOND, PRESIDENT :

In this case the plaintiffs filed their bill the circuit court of Harrison county against John S. Hoffman, Peter B. Righter and others for the enforcement of certain alleged judgment and attachment lien therein mentioned, against lands of John S. Hoffman, Peter B. Righter and Joseph Snider. The suit was commenced on the 31st day of August, 1864, and the bill was filed on the first Monday in September, 1864. Hoffman, Righter, Snider and others were made defendants to the bill; and Hoffman, Righter and Snider were proceeded against in the cause, throughout as non-residents of the State of West Virginia, and by publication and not otherwise. At a circuit court held in said county of Harri-

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son on the 10th day of December, 1864, the cause was heard on the bill and exhibits, and proofs offered.

The court recites in its decree, made at that date, "and it appearing that the order of publication taken at rules in this cause against defendants John S. Hoffman, Peter B. Righter and Joseph Snider, has been regularly executed against them;" thereupon proceeded to declare the judgment, in the bill alleged, to be a lien on the tract of one hundred and twenty-five acres of land belonging to said Righter, situate in the county of Harrison on Koon's Run, and described in the bill, and adjudged, ordered and decreed that unless the debt was paid, together with the costs of suit, within twenty days from the adjournment of the court that Burton Despard and Edwin Maxwell, or either of them, who were appointed commissioners for the purpose, proceed to sell the said one hundred and twenty-five acres of land belonging to said Righter, at public auction, &c., and report their proceedings to the court; and as to all other matters, the cause was continued.

Afterwards at a circuit court held in and for the said county of Harrison, on the 17th of March, 1865, the commissioners Despard and Maxwell, made report of sale of the one hundred and twenty-five acres of land to the plaintiffs, and the court confirmed the sale and by its decree made disposition of the purchase money, as therein specified. And the court, also, then further heard the cause and adjudged, ordered and decreed that the said alleged judgment at law is a lien upon the tracts of one hundred and ninety-six acres and fifty acres of land, situate on Koon's run in Harrison county, belonging to said Righter, and that the alleged judgment is a lien on the undivided interest of the said Joseph Snider in a tract of two hundred and twenty-seven acres of land on the West Fork river, in Harrison county, which descended to him from his father, David B. Snider, such interest being the one undivided fifth part thereof; and adjudged, ordered and decreed that unless the remainder

of said judgment should be paid in twenty days from the date of the decree that said Despard and Maxwell, or either of them, who were appointed commissioners for the purpose, proceed to sell the last named tracts of land at public auction, &c., and report their proceedings to the court; and as to all other matters the cause was continued.

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Afterwards, at a circuit court of said Harrison county, held on 5th of June, 1865, commissioners Despard and Maxwell made report to the court that they had sold the undivided interest of said Joseph Snider, in the two hundred and twenty-seven acre tract of land directed to be sold; and the tract of one hundred and ninety-six acres of land, the property of said Righter, also directed to be sold, and that at the sale the plaintiffs became the purchasers; of the said one hundred and ninety-six acres and James Lynch of the said undivided interest; and the court confirmed the sale and directed deeds to be made on the payment of the purchase money, &c.

Afterwards on the 19th day of March, 1868, the said Peter B. Righter, appeared before the said circuit court of Harrison county and tendered his petition to the court praying for a rehearing of the proceedings in said cause, and moved the court for permission to file the same with his affidavits in relation thereto; and thereupon the plaintiffs appeared in court, to said petition, by their counsel, and objected thereto, and the court ordered the said motion of Righter to be docketed and continued until the next day.

And afterwards at a circuit court held for said Harrison county, on the 4th day of June, 1868, the court, in its decree or order then made in the cause, recites the fact that Righter, at the last term of the court, tendered his petition for a rehearing of the proceedings in the said cause, verified and accompanied by certain affidavits, and sets out, at large, the petition and affidavits, as part



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of the decree and order ; and also recites that Righter had moved the court to file the same ; and on consideration thereof, the court being of opinion, that without the affidavit of said Righter, as prescribed by the said twenty-seventh section of the one hundred and fifty-first chapter of the code of Virginia, as amended by the twenty-ninth chapter of the acts of the Legislature of West Virginia, passed the 11th day of February, 1865, (which he did not take) the said petition can not be filed and the court refused to allow the said petition and affidavits to be filed, or to award a summons to show cause why said cause should not be reheard, but rejected the said petition and affidavits.

From this last named order of the said circuit court the said Righter appealed to this Court, in February, 1871, which appeal has been pending till now ; and it is for this Court to determine if the circuit court erred in its said order.

In his petition Righter states, among other things, that at the commencement of the rebellion, existing on the 11th day of February, 1865, he resided in the county of Marion, in the state of Virginia, and that he resided there at the time of the rendition of the said judgment and decrees, and that he claims to be a citizen of the State of West Virginia. By one of the affidavits filed with the petition, Righter makes oath that the said petition is true, as he believes, and that he will support the Constitution of the United States and the Constitution of West Virginia, &c.; and by the other affidavit he made oath that he could not take and present to the said circuit court with his petition for a re-hearing of the said decree in said court in favor of the plaintiffs against him and others, defendants, the affidavit mentioned and described in the twenty-seventh section of chapter one hundred and fifty-one of the code of Virginia, as amended by the twenty-ninth chapter of the acts of the Legislature of West Virginia, passed the

11th day of February, 1865, without thereby swearing falsely. Both of the affidavits were made on the 18th of March, 1868. The petition in form and substance is sufficient. All the requisitions of the twenty-seventh section of chapter one hundred and fifty-one of the code of Virginia, as amended by the twenty-ninth chapter of the acts of the Legislature of West Virginia, passed the 11th day of February, 1865, seems to have been, substantially, complied with, by Righter, except taking and filing, with his petition, so much of the oath prescribed by said act of the Legislature of the 11th day of February, 1865, as is commonly known and called the "Suitors' Test Oath." So much of the last named act as prescribed the said test oath was, and is, contrariant to the Constitution of the United States, and to the Constitution of this State, and was, and is, from its passage, for that reason, invalid, null and void.—*Cummins v. State of Missouri*, 4 Wall, (Sup. Ct. U. S.), 320; *Ex parte Garland*, *Id.* 333; *Kyle v. Jenkins*, 6 W. Va., 371; *Ross v. Jenkins*, *infra*.

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It was unnecessary, therefore, to entitle Righter to file his petition for a re-hearing in the cause in the circuit court to make and file said test oath. For these reasons the decree and order of the circuit court of Harrison, made in this cause on the fourth day of June, 1868, rejecting the said petition of said Righter, for a re-hearing of the proceedings in said cause, must be reversed and the appellant recover his costs here expended against the appellees, J. & J. W. Lynch & Reynolds. And this Court proceeding to make such order and decree in the cause as the said circuit court ought to have made therein; the cause must be remanded to the said circuit court of Harrison county for further proceedings therein to be had, with directions to said circuit court to allow and permit the said petition of Peter B. Righter for a re-hearing to be filed in the cause, and to cause proper process to be issued thereon, and such other and further proceedings to be had upon said petition, and in said

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cause, as is prescribed by law, and is in accordance with the rules of courts of equity in such cases; and ultimately to grant the re-hearing prayed for in said petition unless sufficient cause, other than any now appearing by the record, be shown, why the prayer of said petition should not be granted, and further to proceed therein, and in said cause, as may be in accordance with the law and the principles and rules governing courts of equity in such cases.

Paull and Moore, Judges concurred.

Hoffman, Judge, did not sit, being a party to the record.

DECREE REVERSED AND SUIT REMANDED.

## WHEELING.

RUFFNER, DONNALLY & Co. v. HEWITT, KERCHEVAL  
& Co.

July 15, 1874.

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1. An agency may be created by express words or acts of the principal, or it may be implied from his conduct and acquiescence. The nature and extent of an agency may be implied and inferred from circumstances. A common mode of appointment of an agent is by a written request, or by implication from the recognition of the principal, or from his acquiescence.
2. An account of sales rendered by a consignee to a consignor is *prima facie* evidence of its correctness.
3. Generally, in equity, an account current rendered by one merchant to another, received and held without objection, will be deemed a stated account, and the objection to such accounts rendered, which will prevent them from being stated accounts, must be made within a reasonable time, and it lies upon the party contesting the accounts, so rendered, to prove that he made objection within a reasonable time.
4. A settled account will, generally, be deemed conclusive between the parties, unless some fraud, mistake, or omission, or inaccuracy is alleged and shown.
5. In cases of settled account a court of equity will not, generally, open the account, but will, at most, only grant liberty to surcharge and falsify, unless in cases of apparent fraud.
6. Generally, it is the right of an agent to be reimbursed all his advances, expenses, and disbursements, made in the course of his agency, on account of or for the benefit of his principal, when the advances, expenses and disbursements have been properly incurred and reasonably and in good faith paid, without any default on the part of the agent.
7. Generally, a dissolution of a partnership leaves every partner in possession of the full power (unless upon the dissolution it has been exclusively confided and delegated to some other partner or per-

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son) to pay and collect debts due to the partnership ; to apply the partnership funds and effects to the discharge of the partnership debts ; to adjust and settle the unliquidated debts of the partnership ; to receive any property belonging to the partnership ; and to make due acquittances, discharges, receipts and acknowledgments of their acts in the premises.

8. Until the affairs of the partnership are settled, and outstanding engagements made good, the partnership must, in contemplation of law, have a continuance, so far as respects the winding up of its affairs.
9. If an agent has, without his own default, incurred losses or damages in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation.
10. It is, ordinarily, the duty of an agent where the business in which he is employed admits of it, or requires it, to keep an account of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts ; and render such accounts to his principal, at all reasonable times, without any suppression, concealment or overcharge.
11. If the agent unnecessarily exceeds his commission, or risks the property of his principal, he thereby renders himself responsible to his principal, for all losses and damage, which are the natural consequences of his act.

An appeal, by Samuel A. Miller and several persons who were members of the firm of Ruffner, Donnally & Co., on behalf of said firm, from a decree rendered by the circuit court of Kanawha county, on the 6th day of July, 1869, in a suit in chancery therein pending, wherein said Ruffner, Donnally & Co. were complainants and Hewitt, Kercheval & Co., Hewitt, Roe & Co., J. J. Roe & Co., Humphrey, Tutt & Terry, and a large number of other persons, were respondents. The names of the various firms, who were made respondents, will be found in the opinion of the Court.

The record, as printed, is very voluminous ; but as the contest turned upon the settlement of various and complicated accounts, extending over a period of several years, between the complainants and respondent firms, which are investigated at length by the Court, and all the material facts stated, the Reporter deems any further statement unnecessary.

The Hon. James W. Hoge, judge of said circuit court, <sup>1874.</sup>  
presided at the hearing below. <sup>June Term.</sup>

*Samuel A. Miller and Daniel Lamb* for the appellants. <sup>Ruffner,  
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*William S. Pope*, of Missouri, and *Nicholas Fitzhugh* for the appellees.

HAYMOND, PRESIDENT :

This is a suit in equity in the nature of a foreign attachment. The bill in the case was filed on the 1st Monday in April, 1859. The several firms of Hewitt, Roe & Co., Hewitt, Kercheval & Co., John J. Roe, & Co., and Humphrey, Tutt & Terry, are the principal defendants, against whom decrees are sought, by the plaintiffs, though there are other defendants, who the bill alleges have an interest; but the bill does not define or specify that interest; and there are still other defects.

I intended to preface this opinion with a full statement of the case as presented by the bill and answers, but found that to do so is not essentially necessary, and would make the opinion unnecessarily lengthy and cumbersome.

From the case as presented by the record it appears that the plaintiffs and a few others, who are dead, but whose personal representatives are parties to this suit, in the latter part of February, 1851, entered into a partnership under the firm name and style of Ruffner, Donnally & Co., in the county of Kanawha, then in the State of Virginia, but now in the State of West Virginia, for the purpose of buying salt, manufactured and to be manufactured, in said county, and vending the same in such markets as might be deemed expedient, in the western and southern states, and to open and keep a dry goods and grocery store in the "Kanawha Salines", in said county—the partnership to expire on the 1st day of January, 1856. In May 1851, the firm of Hewitt,

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June Term. **Roe & Co.**, commission merchants of St. Louis, Missouri, were appointed agents, or rather factors, of the plaintiffs, at that place, to sell at that place, and forward to country agents for sale the salt of plaintiffs, delivered to them. This appointment was made through Lewis Ruffner, one of the plaintiffs, who, at the time, was an active partner, and corresponded with Hewitt, Roe & Co., from Louisville, Kentucky, where he seems at that time to have been acting for the plaintiffs in carrying on their business, or part thereof. The firm of Hewitt, Roe & Co., was composed of James Hewitt, John J. Roe and Robert M. V. Kercheval, and no others.

The defendants Humphrey, Tutt & Terry, Robert M. V. Kercheval, James Hewitt and John J. Roe & Co., filed their answers to plaintiffs bill. The answers are lengthy and specific in character, and deny any indebtedness or liability to plaintiffs, by any or either of them, by reason of the matters alleged in the bill, and in fact it is claimed by Kercheval in his answer that the firm of Ruffner, Donnally & Co., are justly indebted to Hewitt, Kercheval & Co., in a sum and for causes hereinafter named; and Humphrey, Tutt & Terry that Ruffner, Donnally & Co., are indebted to them on account of their agency as factors of Ruffner, Donnally & Co., in a large sum of money, for balance of money advanced and paid by them to and for the use of Ruffner, Donnally & Co.

No other defendants appear to have answered the bill.

Humphrey, Tutt & Terry and Hewitt, Kercheval & Co., filed demurrers to the bill, but the demurrers were overruled by the circuit court of Kanawha county, on the 25th day of June, 1859.

It does not appear by the record that replications of any description were filed by plaintiffs to the answers of the defendants, but it does appear that both plaintiffs and the defendants, who answered, took and filed depositions in the suit, as though a general replication had been filed to each of the answers, and the court seems

to have decided the suit upon its merits, as though general replications to the answers were filed. And in fact the counsel in the court below seem to have considered and argued the suit before the circuit court as though general replications to the answers had been filed. Under these circumstances, I deem it proper that the suit should be considered and determined here as though the record showed that general replications were filed to the answers.

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At the circuit court held for said county on the 18th day of August, 1859, that court heard the cause on the bill and exhibits, the answers of James Hewitt, R. M. V. Kercheval, Humphrey, Tutt & Terry, and the affidavit of Charles Hedrick, and the proceedings theretofore had in the cause, and without undertaking to settle any principles in the cause, decreed that an account be taken before master commissioner Alexander T. Laidley, to ascertain the state of accounts between Ruffner, Donnally & Co., Hewitt, Roe & Co., Hewitt, Kercheval & Co., J. J. Roe & Co., (properly John J. Roe & Co.,) and Humphrey, Tutt & Terry, respectively, arising out of the matter set forth in the bill, and other pleadings, and the proofs that should be offered in the cause, and any other matters which the commissioner should think pertinent, and the parties, or any or either of them, should request, and report his proceedings in the premises to the court.

Afterwards commissioner Laidley made his report to the court to which numerous exceptions were filed by plaintiffs and Hewitt, Roe & Co., Hewitt, Kercheval & Co., John J. Roe & Co. and Humphrey, Tutt & Terry; and on the 6th of July, 1869, the suit was heard by the court upon the papers theretofore read, and proceedings had therein, the depositions of witnesses, and other papers filed in the suit, the reports and accounts of commissioner Laidley and the papers and other evidence filed therewith, the exception of Hewitt, Roe & Co., Hewitt,



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Tutt & Terry, and also the exceptions of plaintiffs thereto,  
Ruffner, and the court sustained the exceptions to the report of  
Donnelly & Co.,  
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Hewitt, Commissioner Laidley filed by Hewitt, Roe & Co., Hew-  
itt, Kercheval & Co. and John J. Roe & Co. And the  
Commissioner having referred the matter of the record  
of Houseman, Smith & Co., against Hewitt, Kercheval  
& Co. (filed as evidence before him) to the court for its  
judgment, the court was of opinion that the amount of  
the recovery shown by the said record against Hewitt,  
Kercheval & Co. is a proper charge against the plaintiffs  
and decreed that the plaintiffs pay to the defendant,  
Robert M. V. Kercheval, surviving partner of Hewitt,  
Kercheval & Co., \$1,348.21, being the principal and in-  
terest of the recovery aforesaid due, that day, and also  
the further sum of \$161.50, being principal and interest  
of the amount paid by them for defending the same ; also  
the costs of Hewitt, Kercheval & Co. incurred by them  
about their defence in this suit and that plaintiffs bill be  
dismissed as to them ; and also that the suit be dismissed  
as to the defendants Hewitt, Roe & Co. and the defen-  
dants John J. Roe & Co. and that the defendant Robert  
M. V. Kercheval, surviving partner of Hewitt, Roe &  
Co. and John J. Roe & Henry J. Moore constituting the  
firm of John J. Roe & Co., recover against the plaintiffs  
their costs by them, severally, in their defence in the suit  
expended. And the court overruled the exceptions of  
the plaintiffs so far as they apply to the controversy with  
the defendants, Humphrey, Tutt & Terry, but sustained  
the exceptions of Humphrey, Tutt & Terry, to the said  
report. And the circuit court not being advised what  
decree should be made as between the plaintiffs and de-  
fendants Humphrey, Tutt & Terry, ordered that the  
cause, as between the plaintiffs and Humphrey, Tutt &  
Terry, be referred to Wm. H. Hogeman, a special com-  
missioner, and required him to state and report the ac-  
counts as between plaintiffs and Humphrey, Tutt &  
Terry, upon this basis, viz: "That he allow the plain-

tiffs the proceeds of the sales of the salt transferred to Humphrey, Tutt & Terry by John J. Roe & Co., for and on account of plaintiffs and the proceeds of all collections made by them of the country agents having salt of plaintiffs in their hands, and also the proceeds of collections on bills receivable in the hands of Humphrey, Tutt & Terry belonging to plaintiffs and transferred to Humphrey, Tutt & Terry, by said John J. Roe & Co., for and on account of plaintiffs and that he allow Humphrey, Tutt & Terry the amount specified in the bills drawn by plaintiffs, by their agent John B. Smith, on Humphrey, Tutt & Terry, and accepted and paid by them for the accomodation of plaintiffs; and also all just expenses, charges and commissions for the sale, and relating to the disposition and sale of said salt, and the collection of said bills receivable, and other claims; and that he report the same, and any other or further matter in the premises that any or either of the parties may require, or said commissioner may himself deem pertinent and proper, to a future term of the court. From this decree, Ruffner, Donnally & Co. appealed and perfected their appeal on the 2d day of July, 1870.

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No question has been made before this Court as to the correctness of the action of the of the circuit court in overruling the demurrers filed to the bill. None of the defendants in their arguments, made or filed in this Court, question that action; and I deem it unnecessary under the circumstances and view I take of the case, to consider further the action of the circuit court in relation to the demurrer. I will proceed at once to the consideration of the question arising upon the decree of the 6th of July, 1869.

The firm of Hewitt, Roe & Co. was dissolved about the 1st day of August, 1854, by John J. Roe, one of the partners, withdrawing from the partnership, of which fact Ruffner, Donnally & Co. then, or about that time, were duly and fully notified. On the dissolution of the firm and partnership of Hewitt, Roe & Co., the firm of

1874.  
June Term. **Hewitt, Kercheval & Co.** was formed, composed of James Hewitt and Robert M. V. Kercheval, two of the former firm of Hewitt, Roe & Co. No other person or persons were connected with the firm of Hewitt, Kercheval & Co. At the time of the dissolution of the firm of Hewitt, Roe & Co., and at the time Ruffner, Donnally & Co., had notice thereof, they were also notified of the formation of the new firm of Hewitt, Kercheval & Co. as commission merchants at St. Louis. The firm of John J. Roe & Co. was composed of John J. Roe and Henry J. Moore, and was formed the 1st of January, 1856; and they were also commission merchants in St. Louis. The firm of Humphrey, Tutt & Terry were commission merchants in St. Louis the first of the year 1857, and perhaps before; but it is not necessary to inquire when this firm commenced business. It was composed of George D. Humphrey, Thomas E. Tutt, Lucius H. Terry and Moses D. Broadwell, and none other; and they continued business at St. Louis until, perhaps, the institution of this suit, and afterwards. The firm of Hewitt, Roe & Co. continued to be the agents or factors of the plaintiffs until its dissolution the on 1st of August, 1854, after which time the firm of Hewitt, Kercheval & Co. became, and continued to be, the agents or the factors of plaintiffs, for the sale of salt and forwarding of salt to country agents until the 22d day of December, 1856, at which time, by an arrangement made by Lewis Ruffner, one of the plaintiffs and sanctioned by John B. Smith, the general agent of Ruffner, Donnally & Co., whose office and place of business was at Louisville Kentucky. Hewitt, Kercheval & Co. ceased to be agents or factors of Ruffner, Donnally & Co., and the salt they then had on hand belonging to Ruffner, Donnally & Co., and the salt that Hewitt, Kercheval & Co. had forwarded to country agents, not wholly accounted for, and belonging to Ruffner, Donnally & Co., and all bills and other evidences of debt belonging to Ruffner, Donnally & Co. in the hands of Hewitt, Kercheval & Co., and the salt placed in the hands of coun-

try agents for sale for Ruffner, Donnally & Co. by <sup>1871.</sup> June Term. Hewitt, Roe & Co., before their dissolution, unsold and unaccounted for, were turned over to and delivered by <sup>Ruffner, Donnally & Co., v. Hewitt, Kercheval & Co.</sup> Hewitt, Kercheval & Co. to the firm of John J. Roe & Co. for sale, collection, settlement, &c., as the agents and factors of Ruffner, Donnally & Co.; and when this was done, the firm of Hewitt, Kercheval & Co dissolved John J. Roe & Co. acted as the agents and factors of Ruffner, Donnally & Co., in the premises, under the arrangement aforesaid, until a short time after the middle of January, 1857, which was about one month, when John J. Roe & Co., by an arrangement made by said Lewis Ruffner, and sanctioned by said John B. Smith, agent as aforesaid, turned over and delivered to Humphrey, Tutt & Terry, as agents and factors of Ruffner, Donnally & Co., all the salt of plaintiffs which they then had on hand, and also all the salt of Ruffner, Donnally & Co., placed in the hands of country agents by Hewitt, Kercheval & Co., then unsold, and all the bills, notes or other evidences of debt then in their hands belonging to plaintiffs, except such as related to the salt forwarded to country agents by Hewitt, Roe & Co., and which had been collected and accounted for, and Humphrey, Tutt & Terry received the same for sale, collection, &c.

Hewitt, Roe & Co., up to the 1st of August, 1854, rendered to plaintiffs, regularly and generally, monthly reports of the amount of barrels of salt received by them, the amount of barrels of salt sold by them, the amount forwarded to country agents, the amount of their charges for commissions on sales and for forwarding, and also rendered, regularly, to Ruffner, Donnally & Co., accounts current between them and Ruffner, Donnally & Co., showing, among other things, their charges and expenditures for Ruffner, Donnally & Co., for storage, shed-cooperage, drayage, &c., in fact, for every charge against them which is rejected by the commissioner in his report.

At the time of the dissolution of the firm of Hewitt,

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Roe & Co., as shown by their account current in the record, rendered July 31, 1854, there was in their hands in St. Louis, four thousand eight hundred and sixty-three barrels of salt, which was turned over by them to Hewitt, Kercheval & Co., with which Hewitt, Kercheval & Co. charged themselves and accounted to Ruffner, Donnally & Co., in their report of sales for August, 1854. On the 16th of January, 1855, Hewitt, Roe & Co., rendered to Ruffner, Donnally & Co., another account current, showing that, at that date, there was a balance due Ruffner, Donnally & Co., on moneys received by them of \$2,135.75, but this was not a final account current. This account current is made up of a number of items of debit and credit. At the time of the dissolution of Hewitt, Roe & Co., there was a large amount of money owing on sales made by them, which had not then been realized, as well as several thousands of barrels of salt forwarded by them to country agents for sale; and Hewitt, Kercheval & Co., being, in some respects, successors to Hewitt, Roe & Co., and interested as members of the late firm of Hewitt, Kercheval & Co., in closing out its business, after the dissolution of the firm of Hewitt, Roe & Co., attended somewhat to the business of Hewitt, Roe & Co., and forwarded some, if not all, of the accounts current of Hewitt, Roe & Co., after July, 1854. It appears by a letter of Ruffner, Donnally & Co., written at Louisville, and dated the 18th of July, 1855, that Ruffner, Donnally & Co., acknowledged to Hewitt, Kercheval & Co., their favor covering statement of Hewitt, Roe & Co.'s collections, and their account current to the first of July, 1855, and Hewitt, Kercheval & Co., in their account current, rendered to Ruffner, Donnally & Co., about the 1st of July, 1855, extending from the 16th day of January, 1855, to the 1st day of July, 1855, inclusive, charge themselves with and give Ruffner, Donnally & Co. credit for \$32,069.50 by Hewitt, Roe & Co., for this amount transferred. So far as any paper or proof in the cause shows, this last amount

embraced and covered the entire amount of moneys or bills, or other evidences of debt of plaintiffs in the hands of Hewitt, Roe & Co., which had been collected on the 1st of July, 1855, and for this sum Hewitt, Kercheval & Co., rendered full account and satisfaction to Ruffner, Donnally & Co., as is shown by their accounts current, rendered in 1855 and 1856. In the letter of Ruffner, Donnally & Co., to Hewitt, Kercheval & Co., dated the 15th of July, 1855, before referred to, Ruffner, Donnally & Co., say: "Your favor 13th covering statement Hewitt, Roe & Co.'s (clearly meaning Hewitt, Roe & Co.'s) collections, and their account current to 1st instant, your sales account and account current to 1st instant, was received on yesterday. We have entered all these and previous accounts on our books, so as to correspond with yours."

From anything disclosed by the record, the credit of \$32,069.50, given Ruffner, Donnally & Co., by Hewitt, Kercheval & Co., aforesaid, closed out all matters between Hewitt, Roe & Co., to the 1st of July, 1855, except salt in the hands of country agents, which had not then been collected, and the proceeds accounted for, and some notes or bills.

It appears that on the 1st day of May, 1854, there were in the hands of country agents, unsold, twenty-one thousand one hundred and thirty barrels of salt of Ruffner, Donnally & Co. This salt had previously been shipped by Hewitt Roe & Co., to country agents for sale. After the 1st day of May, 1854, and before the 1st of August, 1854, Hewitt, Roe & Co., shipped to country agents for sale one thousand five hundred and four barrels of salt, making in the hands of country agents on the 1st day of August, 1854, twenty-two thousand six hundred and thirty-four barrels. By the account of sales rendered by Hewitt, Roe & Co., No. 20, K., January 23, 1855, three thousand one hundred and eighty-four barrels of this amount was accounted for; and also by account, No. 21, K., July 1st, 1855,

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Ruffner, were accounted for; and also by account No. 23, K.,  
Donnally & Co., April 30th, 1857, six thousand and thirty barrels were  
v. accounted for—together making twenty thousand seven  
Hewitt, hundred and forty-nine barrels, leaving one thousand  
Kercheval & Co. eight hundred and eighty-five barrels. But of the  
twenty thousand seven hundred and forty-nine barrels,  
two thousand nine hundred and sixty-nine barrels were  
only partly accounted for by account No. 23, K—  
\$4,881,95, being the sum accounted for on the two  
thousand nine-hundred and sixty-nine barrels, No. 53,  
K., No. 27, K., and No. 20, K., show the country agents  
to whom the twenty-two thousand six hundred and  
thirty-four barrels were shipped for sale. Of the two  
thousand nine hundred and sixty-nine barrels partly ac-  
counted for, five hundred were shipped to H. Cattermole  
and this five hundred barrels was accounted for in full  
as shown by paper No. 19, K., leaving two thousand four  
hundred and sixty-nine, and the residue of this two  
thousand four hundred and sixty-nine not otherwise ac-  
counted for is shown by paper No. 23, K., and the memo-  
randum statement of account of Ruffner Donnally &  
Co., and John J. Roe & Co.

By account No. 21, H., dated December 23, 1855, it  
will be seen that Hewitt, Kercheval & Co., show that  
they received in cash from Walker & Kellogg, Peoria,  
Illinois, in full for one thousand five hundred and  
fifty barrels of Kanawha salt, \$5,005,01, which was for  
salt shipped by Hewitt, Roe & Co., before the 1st of  
August, 1854, and is also a part of the twenty-two thous-  
and six hundred and thirty-four barrels above named.  
This last named amount of money is charged to Hewitt,  
Kercheval & Co., and by them accounted for to Ruffner,  
Donnally & Co.; Hewitt, Kercheval & Co., also charge  
themselves with \$742, September 22, 1855, and credit  
Ruffner, Donnally & Co., therewith, by transfer from  
Hewitt, Roe & Co. This \$742, covers some two hun-  
dred and thirty barrels more. These fifteen hundred and fif-

ty, and two hundred and thirty barrels, Hewitt, Roe & Co., have not hereinbefore had credit for out of the twenty-two thousand six hundred and thirty-four barrels aforesaid, which, when credited to them still further reduces the amount of barrels shipped by Hewitt, Roe & Co., not before accounted for. The papers and figures before referred to, show clearly, it seems to me, that the amount of barrels of salt shipped by Hewitt Roe & Co., to country agents, not paid and settled for by them cannot exceed one thousand two hundred and eighty barrels, and they went into the hands of John J. Roe & Co.; and John J. Roe & Co., in said paper before referred to, report them to Ruffner, Donnally & Co., as having in their hands to collect, and in fact the commissioner has charged them in full to John J. Roe & Co., in his account against them.

But in addition to this, John B. Smith, the agent of Ruffner, Donnally & Co., upon consideration, negotiation and correspondence on the subject, with John J. Roe & Co., and after receiving all the reports of Hewitt, Roe & Co., of their transactions as the agents and factors of Ruffner, Donnally & Co., and with the full concurrence of plaintiff Ruffner, in consideration of the payment of the sum of \$2,000, paid to him for Ruffner, Donnally & Co., by John J. Roe & Co., settled in full all the unsettled claims of Ruffner, Donnally & Co., against them and against Hewitt, Roe & Co.; and in consideration of the payment of the \$2,000, aforesaid, the said John B. Smith as agent as aforesaid, made and delivered to John J. Roe & Co., a receipt in these words, viz: "Received, Louisville, Oct., 1857, of John J. Roe & Co., two thousand dollars (to be applied in payment of an acceptance of their draft, due the 15th inst.,) which amount is in full settlement of all claims against them and against the late firm of Hewitt, Roe & Co., and we hereby relinquish and transfer to them all notes, accounts, salt held by country agents, and all evidences of indebtedness to us, or to them, for our account growing out of previous transactions with them

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as our agents for the — Kanawha salt, agreeably to their proposition made to us in their letter of the 9th inst."

[Signed.]

"RUFFNER, DONNALLY & Co.,  
By JOHN B. SMITH, Attorney."

This receipt was executed on the reception of the \$2,000, and it was enclosed in a letter written from Louisville, Nov. 13, 1857, by said Smith, as agent as aforesaid, to John J. Roe & Co., at St. Louis, in which he says to John J. Roe & Co., "we are sorry to say a short time since a very large fire near us caused us to move our books and papers, and some were lost. The account of J. J. Roe & Co., and Hewitt, Roe & Co., stood open upon our books. Our book keeper had them in a bundle and had not made his entries, as our Mr. Ruffner told him he expected to make this arrangement, and have them all closed up at once. We now must ask the favor of Mr. Cochran to give us a copy of J. J. Roe & Co's account against Ruffner, Donnally & Co., also of Hewitt, Roe & Co., against same, and we promise not to let them go out of our hands until they are entered, and both accounts of Roe & Co., and H. R. & Co., are closed and squared up. Give us the entries necessary to square up our ledger and the salt accounts. We are very sorry to trouble you for these accounts, as they have been rendered, but hope the unfortunate way in which we lost them a sufficient apology." "Your friends,"

[Signed.]

RUFFNER, DONNALLY & Co.,

JOHN B. SMITH.

This letter and receipt is found on pages one hundred and seventy and one hundred and seventy-one of the printed record. A letter from plaintiff Ruffner to J. J. Roe & Co., at St. Louis dated 16th October, 1857, showing that the settlement was made and receipt executed, with the knowledge and sanction of said Ruffner, is found on pages one hundred and sixty-nine and one hundred and seventy of printed record. The deposition of said John B. Smith was taken in this cause by Ruffner, Donnally & Co., and he says, on cross-examination by Hum-

phrey Tutt & Terry, on page two hundred and six of the printed record. "I have acted as the agent of Ruffner, <sup>1874.</sup> <sup>June Term.</sup> <sup>Ruffner,</sup> <sup>Donnally & Co.,</sup> <sup>v.</sup> <sup>Hewitt,</sup> <sup>Kercheval & Co.</sup> Donnally & Co.; my agency commenced in January, 1854; it embraced the district below the Falls of Ohio, including Louisville, St. Louis, and Nashville, and it has continued up to the present time." After this statement by Smith he is asked these further questions, found on pages two hundred and six and two hundred and seven of the printed record. "Have you a written power of attorney conferring the appointment of agent on you; if so you are required to file it." Answer. "I have such a power of attorney, and file it with this deposition marked 'John B. Smith, power of attorney.' Have all your acts under that power of attorney, as agent of Ruffner, Donnally & Co., been recognized heretofore up to the present date, by that firm? Answer. They have. Did you direct or sanction the transfer of the salt, and other effects of Ruffner, Donnally & Co., in January, 1857, from John J. Roe & Co., to Humphrey, Tutt & Terry? Answer. I did." Again on page two hundred and nine of the printed record, said Smith is asked these questions by same: "How much money was raised by you and collected by you during the year 1856 for Ruffner, Donnally & Co.? Answer. About five hundred thousand dollars. How was the greater part of that amount raised? Answer. By bills drawn on salt in the hands of their different agents. Could you have protected the credit of Ruffner, Donnally & Co., or met their liabilities without drawing or negotiating bills during the year 1856, or early part of 1857? Answer. I could not." On page two hundred and nine of the printed record, said Smith also, says: "that on the 1st day of January, 1857, the liabilities of Ruffner, Donnally & Co., at the Louisville agency was \$85,200.00." On page two hundred and twelve of the printed record, said Smith is asked this question by Ruffner, Donnally & Co's., counsel: "Who had the sole direction of the salt of Ruffner, Donnally & Co., in St. Louis in the hands of Hewitt, Kercheval &

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Co., in the year 1856? Answer, I had.” On page two hundred and twenty of the printed record, said Smith is asked this question on cross-examination. “Was not the agency of Ruffner, Donnally & Co., at Louisville, the chief agency for their business west and north-west of Cincinnati; and were not the books and papers for that concern kept at Louisville for all that region, and was not their house at Louisville the only one with which the agents at St. Louis corresponded? Answer, It was; the books and papers were kept here for all that region and their house (Louisville, Ky.) was the only one with which the agents at St. Louis corresponded.” On page two hundred and seven of the printed record, said Smith says, “he rendered accounts to Ruffner, Donnally & Co., each quarter.” On pages two hundred and eighteen and two hundred and nineteen, Smith, on cross-examination, is asked these questions: “Did not J. J. Roe & Co., and Hewitt, Roe & Co., settle with Ruffner, Donnally & Co., through you in October, 1857, for all the business that had been in their hands and was not that settlement satisfactory to you; look at the paper I hand you marked M,” (which is the receipt aforesaid) “filed with the answer of Roe in this cause and state what you know about it; and who signed it?” Answer, “J. J. Roe & Co., had seven thousand four hundred and five barrels of salt transferred to them, it being the balance of Hewitt, Roe & Co’s., salt which was settled for; the paper alluded to and now shown me I signed and I knew the same to be correct.” And afterwards on page two hundred and nineteen of the printed record, Smith in speaking of said seven thousand four hundred and five barrels of salt says: “They were the same Hewitt, Kercheval & Co., transferred to J. J. Roe & Co.; in 1854 Hewitt, Roe & Co., dissolved; Hewitt, Kercheval & Co., were their successors; in December, 1856 Hewitt, Kercheval & Co., transferred the salt of Hewitt, Kercheval & Co., and Hewitt, Roe & Co., to John J. Roe & Co., and when J. J. Roe & Co., transferred to Humphrey, Tutt & Terry

they retained the salt of Hewitt, Roe & Co., and rendered their accounts for same." In his last answer in his deposition on page two hundred twenty-one of the printed record, said Smith says: "The account of Hewitt, Roe & Co., and Hewitt, Kercheval & Co., are kept in the name of Hewitt, Roe & Co., on the books of Ruffner, Donnally & Co.; when Hewitt, Roe & Co., dissolved Hewitt, Kercheval & Co., succeeded them; the accounts of Hewitt, Kercheval & Co., were regularly carried on under the name of Hewitt, Roe & Co., and their accounts have never been separated; the seven thousand four hundred and five barrels of salt was all Hewitt, Roe & Co., had; that has been closed and paid for by J. J. Roe & Co."

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The power of attorney to John B. Smith filed with his deposition is dated the 16th day of January, 1854, and, among other things, it authorizes him to sign the name of Ruffner, Donnally & Co., to all accounts, receipts &c. and to make negotiable notes, bills and other securities in the name of said firm to be used for their purposes and to endorse the name of the firm on all such notes, bills and securities, &c.

The notice of dissolution of the firm of Ruffner, Donnally & Co. as published in the Louisville Journal on the 26th day of January, 1856, is as follows: "The co-partnership of Ruffner, Donnally & Co. expired by limitation the first of this month. John B. Smith is authorized to use the name of the firm in liquidation."

The accounts current of Hewitt, Kercheval & Co., rendered to Ruffner, Donnally & Co. at different times through the year 1856, taken in connection with other evidence, show that it was the habit of Smith, as the agent of Ruffner, Donnally & Co. to draw and sign drafts &c., on them, in the name of Ruffner, Donnally & Co., through the year 1856, for advancements, &c., and to act for Ruffner, Donnally & Co. and as their agent in all respects after the expiration of the year 1855, as before except as to the forwarding of salt.

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The original contract between Hewitt, Roe & Co. and Ruffner, Donnally & Co., as to commissions was, as it appears to me, twenty cents per barrel, on all salt taken from levee and placed in store—Ruffner, Donnally & Co., to furnish house for storage, except guarantee on sales; on all sales from levee thirteen cents per barrel with a like exception; on all salt forwarded to county agents from the levee direct, three cents per barrel, and drayage and cooperage on salt forwarded to be an additional charge. I also am of opinion that according to the true meaning and spirit of the contract, the twenty cents and thirteen cents commissions on sales should be considered the charge only where the salt was delivered on the levee in reasonably good condition as to cooperage, &c.; but if it was necessary on account of the bad condition of the salt as to cooperage, &c., when delivered, that Hewitt, Roe & Co., should expend money about the cooperage thereof, to put it in a condition to secure it from waste, and make it merchantable in barrels, the money so expended should be paid additional; and so of other expenses necessarily incurred for extraordinary purposes to protect and save the salt from distruction or waste while at levees.

I am unable to determine very satisfactorily from exhibit A filed with Roe's answer, being a letter from Hewitt, Roe & Co. to Ruffner, Donnally & Co., dated the 15th of April, 1851, and exhibit B filed with same answer, being a letter from plaintiff, Lewis Ruffner, to Hewitt, Roe & Co., dated the 6th of May, 1851, what compensation Hewitt, Roe & Co. were to receive for collecting from country agents or whether they were to collect at all under the original contract—for Ruffner in his letter says the guarantee is not at this time expected, but sales on time must have reference to the unquestionable solvency of parties. It is not as yet decided whether the Company may not employ a collecting agent." This matter does not appear to have been clearly agreed on at the time of the contract. But this is not very material as

the contract was soon changed by the parties so as to allow Hewitt, Roe & Co., thirteen cents for forwarding from levee to country agents—The only change it can see that was made in the original contract was in substituting thirteen cents in lieu of three cents, and this thirteen cents included, perhaps, though not clearly, ordinary collections from country agents. I think it clear that there was no guaranty or warranty, as to sales on time or salt shipped to country agents. After a careful examination of the charges for commission as shown by the monthly reports of sales and forwarding made by Hewitt, Roe & Co. to Ruffner, Donnally & Co. and their accounts current, and considering all the evidence, and circumstances bearing on the case, and giving them their proper legal effect, and weight, I can not determine that Hewitt, Roe & Co. charged Ruffner, Donnally & Co., excessive or erroneous commissions or drayage. It is true that some of the accounts or returns show charges of seven cents per barrel extra for drayage of salt from levee to yard or place of storage, but on scrutinizing the accounts and returns closely, it will be seen, generally, that where the seven cents per barrel is charged for drayage from levee to yard or place of storage, thirteen cents per barrel only is charged for commission for selling the same, which makes the aggregate charge per barrel for the salt sold at yard or place of storage, twenty cents the contract price. I am clearly of the opinion from the whole case that the charges of Hewitt, Roe & Co. for salt shed, are proper, and so, as to cooperage. The evidence clearly shows that much of the salt was delivered at levee in bad condition as to cooperage.

I think there is sufficient in the record to show that Ruffner, Donnally & Co., assented to and acquiesced in the charges of Hewitt, Roe & Co., for services of special agent in collecting, at five times, in the months of April, October and November, 1852, and May, 1854. These charges of Hewitt, Roe & Co., which I have been considering, were all communicated and returned by Hew-

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*Ruffner,* *ports of sales and accounts current, at or near the time*  
*Donnally & Co., they were incurred and made, without objection at the*  
*v.* *time or until this suit was brought some six years sub-*  
*Hewitt,* *sequent; and were adopted and admitted as proper by*  
*Kercheval & Co.,* *Ruffner, Donnally & Co's, agents, and in fact settled as*  
*proper by Ruffner, Donnally & Co.*

I will now proceed to ascertain the law applicable to this case as between Hewitt, Roe & Co., and Ruffner, Donnally & Co., and in many respects as applicable to the acts of John B. Smith, as the agent of Ruffner, Donnally & Co., after the expiration of the year, 1855, and also of plaintiff Ruffner, and the legal weight and effect to be given to the reports of sale and accounts current made and returned to Ruffner, Donnally & Co. Ruffner, Donnally & Co., were salt merchants as well as merchants otherwise—their residence and place of buying salt was Kanawha Co., Va.; Hewitt, Roe & Co., were commission merchants doing business in a different state and at considerable distance from Virginia. Hewitt, Roe & Co., in 1851, became the agents or factors of Ruffner, Donnally & Co., in St. Louis, as hereinbefore stated.

A factor is commonly said to be an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal, for a compensation commonly called factorage or commission; and when for additional compensation, in case of sale, he undertakes to guaranty to his principal the payment of the debt due by the buyer, he is said to receive *del credere* commission. A factor is called a home factor when he resides in the same state or country with his principal; and he is called a foreign factor when he resides in a different state or country. Story on Agency, section 33 and cases there cited. An agent may ordinarily be appointed by parol, in the broad sense of that term at the common law; that is by a verbal declaration, in writing not under seal

or by acts and implications. An agency may be created by express words or acts of the principal, or it may be implied from his conduct and acquiescence. So the nature and extent of the authority of an agent may be implied or inferred from the circumstances. Same author section 15. The most usual mode of appointment of an agent is by an unwritten request, or by implication, from the recognition of the principal or from his acquiescence in the acts of the agent. Same author section 54. If an agent has, by a deviation from his orders, or by any other misconduct or omission of duty, become responsible to his principal for damages, he will be discharged therefrom by the ratification of his acts or omissions, by the principal, if made with full knowledge of all the facts and circumstances. A ratification, when fairly made, will have the same effect as an original authority has, to bind the principal, not only in regard to the agent himself, but in regard to third persons. The ratification relates back to the inception of the transaction, and has a complete retroactive efficacy. Same author, secs. 443, 244. The principal cannot, of his own mere authority, ratify a transaction in part and repudiate it as to the rest. And the general rule seems to be that where a ratification is established as to part, it operates as a ratification of the whole of that particular transaction of the agent. It is not necessary that there should be any positive or direct confirmation. And for this purpose the acts and conduct of the principal are construed liberally in favor of the agent. Long acquiescence without objection, and even silence of the principal will in many cases amount to a conclusive presumption of the ratification of an unauthorized act; especially where such acquiescence is otherwise not to be accounted for; or such silence is either contrary to the duty of the principal, or it has a tendency to mislead the agent. Thus if an agent without authority should compromise a debt of his principal, who after knowledge of the fact should make no objection, but acquiesced for a length of time in the act, he would be held bound by it.

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When an agency actually exists the mere acquiescence of the principal may well give rise to the presumption of an intentional ratification of the act. Same author, sections two hundred and fifty and two hundred and fifty-five. In respect to silence, whether it operates as a presumptive proof of ratification may essentially depend upon the particular relations between the parties, and the habits of business, and the usages of trade. In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of the one party, receiving a letter from the other, to answer the same within a reasonable time; and if he does not, it is presumed that he admits the propriety of the acts of his correspondent, and confirms and adopts them. This principle seems now, in favor of commerce, to be universally acted upon. And therefore, if the principal, having received information, by a letter, from his agent, of his acts, touching the business of his principal, does not, within a reasonable time, express his dissent to the agent, he is deemed to approve his acts, and his silence amounts to a ratification of them. In the case of *Mertens v. Nottbohm*, 4 Gratt., 163, it was decided that "An account of sales rendered by a consignee to his consignor is *prima facie* evidence of its correctness." In the case of *Tournes v. Birchett*, 12 Leigh, 196, Judge Allen, in his opinion, says, "Where merchants deal with each other, and accounts current are rendered, the party receiving and not objecting, deprives the other of the opportunity of declining to deal with him, as not advantageous. He has a right to presume from long acquiescence, that his rates and mode of charging are satisfactory, and continues to deal upon that presumption." In the case last cited, this is a part of the syllabus, thereof: "The rule of courts of equity, that an account current rendered by one party to another, received and held without complaint or objection, shall be deemed a stated account, considered. It seems the rule is not confined to accounts rendered by merchant to merchant, of mutual dealings

between them as merchants, much less to accounts rendered by merchants abroad to merchants at home; that objections to such accounts rendered, which will prevent them from being stated accounts, must be made within a reasonable time; and that it lies upon the party contesting the accounts so rendered, to prove that he made objection within a reasonable time: the rule is founded on the acquiescence of the party." In the case of *Mertens v. Nottebohm*, 4 Gratt., Judge Cabell says: "The efficacy of a stated account between merchant and merchant, is founded on the supposed acquiescence in its justice on the part of him to whom it is rendered." Judge Story, in his *Eq. Juris.*, vol. 1, sec. 526, says: "But in order to make an account a stated account, it is not necessary that it should be signed by the parties. It is sufficient, if it has been examined and accepted by both parties. And this acceptance need not be express; but may be implied from circumstances. Between merchants at home, an account, which has been presented, and no objection made thereto after the lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account. Between merchants in different countries, a rule, founded in similar considerations, prevails. If an account has been transmitted from the one to the other, and no objection is made, after several opportunities of writing have occurred, it is treated as an acquiescence in the correctness of the account transmitted; and therefore it is deemed a stated account. In truth, in each case, the rule admits or rather requires, the same general exposition. It is, that an account rendered shall be deemed an account stated, from the presumed acquiescence of the parties, unless an objection is made thereto within a reasonable time. That reasonable time is to be judged of in ordinary cases, by the habits of business at home and abroad; and the usual course is required to be followed, unless there are special circumstances to vary it, or to excuse a departure from it." And in the succeeding section he says:

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"Upon like grounds, *a fortiori*, a settled account will be deemed conclusive between the parties, unless some fraud, mistake, omission, or inaccuracy is shown. For it would be most mischievous to allow settled accounts between the parties, especially when vouchers have been delivered up or destroyed, to be unravelled, unless for urgent reasons, and under circumstances of plain error, which ought to be corrected. And, in cases of settled account the court will not generally open the account; but will, at most, only grant liberty to surcharge and falsify, unless in cases of apparent fraud." In the case of *Stoughton v. Lynch*, 2 Johns. Ch., (N. Y.,) 209 it was held that "a party cannot surcharge or falsify an account, unless on the ground of mistake or error distinctly charged." In *Consequa v. Fanning*, 3 Johns. Ch., (N. Y.,) 595 and 596, it was held, that "an order of reference for an account before a master, must be founded on the pleadings and proofs, and cannot be made more extensive than the allegations and proofs of the parties." In 1 Phillips on Ev., with Cowen and Hill's notes, 445, it is stated that "if an account has been sent to a party, and kept by him for a length of time without making any objection, it will, in ordinary matters of business, among merchants, raise an inference that the correctness of the account is admitted by the party receiving it. And where an account was shown to a party, who raised an objection to one item, but made no remark with respect to the rest, it was held to be evidence of an account stated, as to those items to which no objection was made. *Chisman v. Count*, 2 Man and Grang., 307: "An account stated, or settled, is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish, *prima facie*, the accuracy of the items without other proof, and the party seeking to impeach it is bound to show, affirmatively, the mistake or error alleged. But the parties are never precluded from giving evidence to impeach the account, unless the case is brought within

the principles of an *estoppel in pais*, or of an obligatory agreement between the parties; as, for instance, when, upon a settlement, mutual compromises are made. Opinion of Selden, J. 18 N. Y., 292.

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It is the right of an agent to be re-imbursed all his advances, expenses and disbursements made in the course of his agency, on account of or for the benefit of his principal. Hence, all the incidental charges and expenses incurred for warehouse room, duties, freight, salvage, repairs, journeys and other acts done to preserve the property of the principal and to enable the agent to accomplish the objects of the principal, are to be fully paid for by the latter. But this liability of the principal proceeds upon the ground, that the advances, expenses and disbursements have been properly incurred, and reasonably and in good faith paid, without any default on the part of the agent. Story on Agency, section 336.

I think it is clear from the whole case that John B. Smith was not only the agent of Ruffner, Donnally & Co., to the close of 1865, but that he continued to be their agent up to the bringing of this suit, and that Ruffner, Donnally & Co., ratified and confirmed all his acts in the premises, as well as authorized them, and that it cannot, reasonably or justly, be held otherwise, upon the law and evidence in the cause. Smith was the witness of Ruffner, Donnally & Co., and his evidence, a part of which, only, I have recited, proves, I think, beyond doubt, that he had the direction and control of the salt and business of Ruffner, Donnally & Co., in St. Louis; that during the years 1856 and 1857, he collected and raised from the agents of Ruffner, Donnally & Co., in the shape of advancements and payments, at least a half million of dollars, by bills, drafts, &c., drawn, endorsed and accepted in their firm name by him and applied the money to their use and relief; and that they were cognizant of his acts and mode of doing business

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Ruffner, others, the settlement and adjustment of the accounts  
Donnally & Co., and liabilities of Hewitt, Roe & Co., as well as John J.  
v. Roe & Co. The most of his acts in the premises seem  
Hewitt, to have been done under the eye and with the knowl-  
Kercheval & Co. edge and sanction of the plaintiff, Lewis Ruffner, who  
was one of the firm of Ruffner, Donnally & Co., and  
especially so, of this settlement and adjustment. "Where  
notice of the dissolution is proved, the plaintiff may re-  
but it by evidence of the subsequent conduct and decla-  
rations of the defendants, tending to induce the world  
to suppose that the partnership still subsisted; as by  
proof that they subsequently interfered in the manage-  
ment of the business, or allowed their names to be used,  
or in any way authorized the parties acting in the con-  
cern to make use of their names and credit." Gow on  
Partnership, 3rd Am. Ed., 198. In Story on Partnership,  
section 328 it is said: "Hence it is now the admitted  
doctrine of the common law, that although the dissolu-  
tion of the partnership disables any one of the partners  
from contracting new debts, or buying or selling or  
pledging goods, on account of the firm in the course of  
the former trade thereof; yet, nevertheless, it leaves  
every partner in possession of the full power, (un-  
less, indeed upon the dissolution it has been exclu-  
sively confided and delegated to some other partner or  
person) to pay and collect debts due of the partnership;  
to apply the partnership funds and effects to the dis-  
charge of the partnership debts; to adjust and settle  
the unliquidated debts of the partnership; to receive  
any property belonging to the partnership; and to  
make due acquittances, discharges, receipts and ac-  
knowledgements of their acts in the premises. For  
all these acts, if done *bona fide*, are for the advancement  
and consummation of the great objects and duties of the  
partners, upon the dissolution, to wind up the whole part-  
nership concerns, and to divide the surplus, if any,  
among them, after all debts and charges are extinguish-

ed." Collyer on Partnership, section 546. "Thus it appears that a dissolution is in some respects prospective only." Collyer on Partnership, section 546. In *Brown v. Higginbotham & Co.*, 5 Leigh, 583, it was decided that "until the affairs of the partnership are settled, and outstanding engagements made good, the partnership must, in contemplation of law, have a continuance, so far as respects the winding up of its affairs." It was further held and determined, in this last case, that P. & B. being partners and P. being the agent of H. & Co., and having paid debts of the partnership of P. & B., out of the funds of H. & Co., B., as well as P., is bound to refund the money to H. & Co., and this, though such payment was made by P., after dissolution of the partnership. Judge Tucker, who delivered the unanimous opinion of the court in the case, said: "Both these debts were due either to Mrs. Crawford and the overseer, or to Higginbotham & Co.; and as Higginbotham & Co., paid them by direction of one of the firm of Brown & Paull, though after its dissolution, it cannot be regarded as an officious payment. For until the affairs of a partnership are settled, and outstanding engagements are made good, the partnership must, in legal contemplation, have a continuance, so far at least as respects winding them up. Gow, 312, [287;] 15 Ves. (Jr.) Ch., 226-7; 16 Ves. (Jr.) Ch., 57; 1 Swanst. Ch., 480."

It was competent for Ruffner, Donnally & Co., in this case, to show by evidence that the accounts between them and Hewitt, Roe & Co., have not been stated or settled. This, I think, they have clearly failed to do. But on the contrary, the evidence proves that the accounts were not only stated, but settled, adjusted and satisfied. It was also competent for Ruffner, Donnally & Co., by evidence, to impeach the settled account, by showing fraud, mistake or error in so far as substantially alleged in the bill. But no notice, whatever, is taken of the settlement in the bill, and consequently no fraud, mistake or error therein is alleged. On this subject, the bill sim-

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Hewitt,  
Kercheval & Co.** ply alleges "that Hewitt, Roe & Co., and Hewitt, Kercheval & Co. have, in their returns of sales of salt, made charges against your orators which are erroneous, and in violation of their contract aforesaid, a list of which are herewith filed, marked 'O C;,' that there are other errors and improper charges, which they are not at this time prepared to present by special items, but so soon as it can be done, will be presented by a statement in writing, and filed in the papers of the cause." Plaintiffs never assigned additional errors in the returns in writing, by amended bill or otherwise, properly, so defendants might have notice and be put on their guard, so as to answer and make defense, though the largest charges made by commissioner in his report contained are not mentioned in the paper "O C." Plaintiffs must have known of the settlement or adjustment when they filed their bill, but they have not alleged in the bill that it was procured by fraud, or attempted to surcharge or falsify it, by alleging in the bill that there was mistake or error therein, and pointing the same out therein, and asking that the same be corrected. When there is a settlement of accounts shown, we have seen that, generally, this is necessary in equity. In cases of settled accounts, the court will not generally open the accounts; but will, at most, only grant liberty to surcharge and falsify, unless in cases of apparent fraud. I don't think there is apparent fraud here. And neither fraud, mistake or error in either the account or settlement is satisfactorily proven. In fact Ruffner, Donnally & Co. have offered but little evidence, and all their allegations are denied in the answers made under oath, and the answers of the members of the firm of Hewitt, Roe & Co. deny all the material allegations of the bill as to errors in the accounts under the contract, &c.; and the evidence adduced and filed by them, I think, substantially sustains the answers in this respect. For these reasons I think there was no error in the decree of the circuit court in sustaining the exceptions of Hewitt, Roe & Co.,

to the commissioner's report, and dismissing the cause as to Hewitt, Roe & Co.

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The firm of Hewitt, Kercheval & Co. was a separate and distinct firm from that of Hewitt, Roe & Co. They commenced business about the 1st of August, 1854, and at the dissolution of Hewitt, Roe & Co., Hewitt, Kercheval & Co., upon the formation of their firm, took charge of Ruffner, Donnally & Co.'s salt business in St. Louis, upon the same terms and contract of Hewitt, Roe & Co. This rate of compensation continued until about the 15th day of January, 1855, by which time they had closed out all the salt of Ruffner, Donnally & Co., received by them, being about six thousand four hundred and four barrels, and rendered an account of sales, with an account current therefor. They then informed Ruffner, Donnally & Co., that they could not, and would not, longer receive and dispose of their salt in St. Louis, unless their compensation was increased. The amount demanded and agreed on was, I think, clearly, from the evidence and circumstances shown, twenty cents for sales from levee, twenty cents and drayage for forwarding and collecting from levee and twenty-five cents for sales from store—Ruffner, Donnally & Co., to pay storage—and in all other respects similar to the former arrangement. This I think is manifest from the correspondence upon the subject, and the acts of the parties under the arrangement afterwards and throughout. The correspondence on this subject commences on page seventy-one and on page seventy-seven of printed record. Ruffner, Donnally & Co., through their Mr. Ruffner, endeavored and insisted that Hewitt, Kercheval & Co., should agree to less compensation, but they declined and insisted on surrendering the agency, unless the compensation then demanded by them was conceded; and Ruffner, Donnally & Co. did concede it, and in the correspondence admitted that the former compensation was low. Hewitt, Kercheval & Co. continued to act as the agents and factors of Ruffner, Don-



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Ruffner, during which time they received from Ruffner, Donnally  
Donnally & Co., & Co., at St. Louis, many thousand barrels of salt, all of  
v. which they sold and forwarded to country agents except  
Hewitt, about six thousand seven hundred barrels, which they  
Kercheval & Co. then delivered and turned over to John J. Roe & Co.,  
commission merchants of St. Louis, as their successors  
in the factorage business of Ruffner, Donnally & Co.,  
under an arrangement then and there made by said Lewis  
Ruffner, Hewitt, Kercheval & Co. and John J. Roe & Co.  
all of which was sanctioned and confirmed by John B.  
Smith, the said agent of Ruffner, Donnally & Co., and  
by him fully recognized.

Under the last named arrangement and in accordance therewith Hewitt, Kercheval & Co., not only turned over to John J. Roe & Co., the six thousand and seven hundred barrels of Ruffner, Donnally & Co.'s salt then on hand, but they also transferred to said Roe & Co bills receivable of Ruffner, Donnally & Co. received by them upon sales of salt to the amount of \$17,151.17 and also eight thousand five hundred and fifty-nine barrels of salt shipped by them to country agents, which had not then been fully accounted for, and at once rendered to Ruffner, Donnally & Co. their final account current showing that Ruffner, Donnally & Co. were indebted to Hewitt, Kercheval & Co., in a balance of \$23,769.08. Ruffner, Donnally & Co., by their said agent, by letter dated the 27th of December, 1856, acknowledged the receipt of the account. See printed record, 144. It appears that Hewitt, Kercheval & Co., during their entire agency, rendered, about monthly, to Ruffner, Donnally & Co., accounts of their monthly sales, and in each account they state their commissions under the different contracts. They also rendered to Ruffner, Donnally & Co., accounts current, frequently, in each year, in which, among the other items, they state their commissions, the amount paid for drayage and cooperage, for rent of yards, for labor in and about protecting and saving Ruffner, Don-

nally & Co.'s salt at levee, and amount paid to agents and otherwise, for Ruffner, Donnally & Co. and charge them therein therewith; and the final account rendered is of the same character and is explicit. The first accounts they rendered were for the month of August, 1854, in which they show they received from Hewitt, Roe & Co. four thousand eight hundred and sixty-three barrels and per "Stella Blanch" one thousand five hundred and forty-one barrels making in the aggregate six thousand four hundred and four barrels of which they sold three thousand four hundred and forty-nine barrels and forwarded two hundred and five barrels, and they charged Ruffner, Donnally & Co. with drayage on nine hundred and seventy-one barrels at yard amounting in the aggregate to five thousand eight hundred and seventy-five barrels which is less than seven cents per barrel and to labor repiling salt at levee \$12, and cooperage on one thousand five hundred and forty-one barrels received by "Stella Blanch" thirteen cents commission, per barrel, on sales \$448.37. This account was forwarded to Ruffner, Donnally & Co., on the 8th September, 1854, and on the 19th Ruffner, Donnally & Co., by L. Ruffner, one of the firm, acknowledged its receipt with an apology for not replying sooner, and no objection or exception whatever is made to any of the charges or part of the accounts whatever. They rendered monthly accounts of sales for September, October and November, 1854, in each of which they state their commissions, and the receipt thereof is promptly acknowledged and stated to be right or satisfactory.

In November Hewitt, Kercheval & Co., sold all the salt they had on hand, consequently made no sales in December.

On the 16th of January, 1855, they rendered to Ruffner, Donnally & Co., an account current of their matters to that date in which all their charges are stated and no exception or objection was made or taken to it. In their account and report for February, 1855, they charge Ruff-

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current to 1st July is acknowledged by Ruffner, Donnally & Co., by letter dated 18th of July, in which no objection is made to any charge. On the contrary the letter acknowledging receipt says: "We have entered all these and previous accounts on our books, so as to correspond with yours." Accounts of sales were also rendered for July, August and September with commissions at the rate of twenty-five cents per barrel on sales, and declared by Ruffner, Donnally & Co., in the letters acknowledging receipt to be right. For the month of October, 1855, Hewitt, Kercheval & Co., on the 6th November, forwarded an account of sales with commission, twenty-five cents, and also an expense account in which drayage is charged on fifteen hundred barrels of salt to boat \$105.00 and twenty-five cents commission per barrel for forwarding, amounting to \$175. This account of sales is acknowledged to be received and to be correct and entered. This fifteen hundred barrels was evidently forwarded from yard and not levee. On the 2nd of April, 1856, Hewitt, Kercheval & Co., rendered an account current from 1st July, 1855 to 1st April, 1856, in which there are various charges for rent, commission &c., and the receipt of it is acknowledged by Ruffner, Donnally & Co., per John B. Smith, by letter, dated April 5, 1856, in which no objection is made for any overcharge of commission or drayage. Some inquiry is made about some other matters which were promptly explained by letter dated 9th April. Hewitt, Kercheval & Co., also returned an account current from 1st April, 1856 to October, of which no complaint or objection appears to have been made. On the 4th November, 1856, Hewitt, Kercheval & Co., made return for October and in their letter to Ruffner, Donnally & Co., enclosing it they say: "We are having Messrs. Ruffner, Donnally & Co's., salt put in order; it is a bad job, and we trust in future that you will send your correspondents here better coo-perage, and allow them to keep it under cover." To

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edging receipt of letter of 4th and says: "We hope you  
Ruffner, and our Mr. Ruffner will be able to fall on some plan to  
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Hewitt, work off Ruffner, Donnally & Co's., salt. Owing to its  
Kercheval & Co. condition it will hardly keep if suffered to lay over an-  
other season—would prefer taking less price." And  
then Hewitt, Kercheval & Co., rendered a final account  
current from 1st October, 1856 to 22d December, 1856,  
inclusive, before referred to. In the letter of Ruffner,  
Donnally & Co., acknowledging the receipt of final ac-  
counts, no objection or exception is taken to any part or  
charge therein, except an explanation is asked concern-  
ing two items, to-wit: in relation to a charge for dray-  
age on the salt in the yard turned over to Roe & Co.,  
and the charge of  $\frac{1}{2}$  per cent. on \$10,000 to Bank of  
Missouri, \$50.00. This letter was written by said John  
B. Smith, and among other things it says: "The cooper-  
age bill is awful, but we expect you had a hard time of  
it." On the 31st of December, 1856, Samuel C. Cochran,  
the clerk of Hewitt, Kercheval & Co., addressed a letter  
to Ruffner, Donnally & Co., explaining the two items in  
the account about which the enquiry was made, and I  
think the explanation reasonable and satisfactory. In  
his letter of explanation, Cochran, speaking for Hewitt,  
Kercheval & Co., says: "In relation to the charge for  
drayage and labor on six thousand seven hundred barrels  
of salt turned over to John J. Roe & Co., when making  
up your account, I suggested to Mr. Kercheval the idea  
of making the charge to John J. Roe & Co. He replied  
that it should be made to your account, and that John J.  
Roe & Co., in making up account of sales would charge  
commissions, twenty-five cents per barrel, less than the  
drayage. The charge  $\frac{1}{2}$  per cent. on \$10,000, allowed  
Bank of Missouri, was an exchange which they had to  
take of the Bank in order to get the bills drawn on you  
discounted at bank rates. They could have bought  
exchange on New York, outside, at par, but had they  
sold these bills on you outside, it would have been at a

much greater discount than in Bank." In the said letter of Ruffner, Donnally & Co., they do not claim, as I understand it, that Hewitt, Kercheval & Co., were not entitled to receive the drayage, but they suggest that it would not be proper for them to pay it, and then pay Roe & Co., full commission of twenty-five cents for sales. I think it is clearly proven by Cochran, that the arrangement and understanding between the parties, at the time, of the transfer to John J. Roe & Co., was, that Roe & Co., were to charge twenty-five cents per barrel for the sale of that salt, less the drayage, and Roe & Co., in pursuance of that arrangement, did only charge Ruffner, Donnally & Co., seventeen cents per barrel on so much of that salt as they sold as may be seen by their report of the sale of forty barrels, which was all they sold before the agency was transferred from them to Humphrey, Tutt & Terry; and Cochran further proves, in same connection, as part of said arrangement and transfer, that John J. Roe & Co., were to charge no commissions for collections from country agents, while the agency remained in their hands.

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It does not appear that any answer was sent to Cochran's letter of explanation. But afterwards on the 12th day of January, 1857, and after the letter of Cochran must have been received, the said John B. Smith gave or sent to said Ruffner, who was going or was sent to St. Louis to see John J. Roe & Co., among perhaps others, a letter of instructions. This letter is directed to Lewis Ruffner, Esq., and the material part of it is in these words, viz: "J. J. Roe & Co. have to pay for Ruffner, Donnally & Co., as per Kercheval's balance \$23,750 maturing as follows: March 4, \$5,000; do. March 8, \$2,500; do. March 11, \$1,250; do. March 13, \$2,500; do. March 18, \$2,500; do. March 21, \$2,500; do. March 22, \$2,500; do. April 4, \$2,500; do. April 8, \$2,500; (aggregating) \$23,750. \* \* We have drawn on J. J. Roe & Co. at 4 m. d., in December, for \$10,000. We have written them to send authority for 15,000 at 4 m.

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d., for January. We will want for February 4 m. d., at least \$15,000, and \$15,000 for December and February. If they mature before, in funds, we can easily, if necessary, use letters of credit at 4 m. d. at their maturity, and send proceeds to J. J. Roe & Co. in exchange for checks on St. Louis. We prefer negotiating here, as it can be done cheaper and on longer time. You will please make the arrangements above mentioned for the months of March and February, and if January authority has not been sent, send it at once. You will please have an understanding that we can get these amounts as wanted each month. You will please urge them to close off Ruffner, Donnally & Co.'s salt in the city in spring before new salt will go forward." Here is an express direction to pay Hewitt, Kercheval & Co.'s balance which was in acceptances at time amounting to \$23,750, which was the whole of their balance as per their accounts returned, except \$19.08, and that was paid by John J. Roe & Co., and the \$23,750 was met and paid by Humphrey, Tutt & Terry, to whom the agency was transferred from John J. Roe & Co. by an arrangement made by said Ruffner, and sanctioned and acted upon by said Smith as the agent of Ruffner, Donnally & Co., and it was paid with the knowledge and by the direction of Smith, as well as Ruffner. Thus it will be seen that the account of Hewitt, Kercheval & Co. and Ruffner, Donnally & Co. as returned by Hewitt, Kercheval & Co., was fully settled and paid in accordance with the account as stated by Hewitt, Kercheval & Co. in their final accounts current returned to Ruffner, Donnally & Co., the balance in said account being \$23,769.08.

After this account had been stated and settled by payments and on the 30th of August, 1858, some seventeen months after the final account was returned and more than a year after the balance to Hewitt, Kercheval & Co., had been settled by payment, said John B. Smith wrote a letter to Robert M. V. Kercheval dated at Louisville, 30th August, 1858, in which he says: "Messrs. Hum-

phrey, Tutt & Terry, make charges for commissions and cooperage; also drayage in some cases. Mr. Wilson, the acting agent of Ruffner, Donnally & Co., and Mr. Hale, of Ruffner, Hale & Co., as well as Mr. Ruffner, have written me frequently, and say write to you, that they expect next month, and early in the month, to make a settlement with Humphrey, Tutt & Terry, and wish me to say to you that they will expect you to pay whatever they may have to pay for winding up the business left by you. They further say, they have been informed that when you made up your mind to go to Liverpool that your instructions were to Mr. Martin to ship every barrel he could everywhere, as that would give you twenty cents in your pocket." To this letter Kercheval replied at length, repudiating the claims and charges made in Smith's said letter and claiming that Hewitt, Kercheval & Co., nor he, were in anywise responsible for any commissions or charges that Humphrey, Tutt & Terry may have charged; that Hewitt, Kercheval & Co., had nothing to do with the transfer by Ruffner, Donnally & Co., of the agency from John J. Roe & Co., to Humphrey, Tutt & Terry, and did not know of it at the time, or the terms on which it was done; that that was a matter of arrangement between Ruffner, Donnally & Co., and Humphrey, Tutt & Terry in which Hewitt, Kercheval & Co., had no part or concern. He also complains that he (Smith) did not make the objection sooner when he knew the facts better than now. To this letter Smith wrote a short reply dated 4th September, 1858, in which he says Kercheval's letter of the 2d inst. is at hand; that he wrote Kercheval only as he was requested by the parties and will lay his reply before them, and when he hears from them will again let Kercheval hear from him.

At this point further correspondence seems to have ceased on this subject and nothing further appears until this suit was brought.

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I should here state that it was part of the original contract between Hewitt, Roe & Co., and Ruffner, Donnally & Co., that Hewitt, Roe & Co., should accept for Ruffner, Donnally & Co., without charge and pay their bills when due, if in funds, without charge, but if Hewitt, Roe & Co. made advances they would make the additional entry. And this part of the contract appears to have been continued and acted on throughout all the transfers of the agency.

It appears that Hewitt, Kercheval & Co., by letters informed and complained to Ruffner, Donnally & Co., at different times in 1855, of the bad state and condition in which much of their salt was delivered on the levee at St. Louis, and especially as to its bad condition as to cooperage and informed them of the necessity, for its preservation, of much cooperage being done, beyond what might be considered ordinary cooperage; that for what they called ordinary cooperage they made no charge, but their charges were for extraordinary cooperage. I think the evidence clearly proves that much of the salt was delivered in very bad condition, as to cooperage and otherwise; that much of it had been on hand a considerable time before delivery and had been exposed and injured by bad usage before delivery; that the cooperage for which Hewitt, Kercheval & Co., charged Ruffner, Donnally & Co., was necessary and in fact essential to the preservation of the salt and putting it in a marketable condition; that it was reasonable and prudent that Hewitt, Kercheval & Co., should have the cooperage done, and that under the circumstances, as shown in the cause, and the law, Ruffner, Donnally & Co., should pay for it as they did. The charges of commission on barrels of salt used in filling up other deficient barrels may not be within the letter of the contract, still the charges as they occurred, were reported to Ruffner, Donnally & Co., with the other charges and were not objected to, and must be considered as acquiesced in and assented to by Ruffner, Donnally & Co., as

being within its spirit and according to their usages of trade.

The charge of twenty-five cents per barrel for salt forwarded from place of storage, and not from levees is perhaps not within the strict letter of the contract as originally made, as that contract so far as disclosed was twenty cents for sales at levee, twenty cents and drayage for forwarding from levee to country agents, and twenty-five cents, and storage for sales from place of storage. Upon the salt so forwarded from storage, Hewitt, Kercheval & Co., had paid the drayage from levee to place of storage, and the difference in cents to Hewitt, Kercheval & Co., between forwarding from the place of storage, and the levee must have been equal, at least, to five cents on the barrel. And I think the contract, according to its spirit, contemplated that Hewitt, Kercheval & Co., should receive the same compensation for forwarding and collecting that they were to receive for sales made at the same place; and Ruffner, Donnally & Co., made no objection to these charges when the final accounts current were returned by Hewitt, Kercheval & Co., although they did make enquiry as to two other charges, and in fact, did not raise or make any question or objection to these charges of commission on the three thousand one hundred and eighteen barrels of salt forwarded from place of storage for some eighteen months after the return of the final account current. Besides, I think the evidence clearly establishes that these three thousand one hundred and eighteen barrels of salt were not forwarded from place of storage contrary to instructions. It is true that during the spring of 1856, Ruffner, Donnally & Co., by their said agent, Smith, did instruct Hewitt, Kercheval & Co., not to forward any more salt to country agents, but to sell the salt in the city; but it is manifest that at that time, Smith supposed that the salt then in hand would be sold in the city during the ensuing summer and fall; but during the summer and fall the demand for salt seems to have been dull and the salt was not all sold by a large amount.

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And on the 7th October, 1856, Ruffner, Donnally & Co. by their said agent, Smith, by letter to said Hewitt, Kercheval & Co., say: "as to Ruffner, Donnally & Co.'s salt we are anxious to have it closed off, and as we have written you, leave its management to your better judgment." See printed record, 326; also see letter from Lewis Ruffner to Hewitt, Kercheval & Co. of date 1st December, 1856. On the 15th December, 1856, after the salt had been forwarded, said Smith, as agent for Ruffner, Donnally & Co. said to Hewitt, Kercheval & Co., by letter, "we are sorry to part with you as our correspondent; as it is so, we are pleased to fall into such good hands as our mutual friends, J. J. Roe & Co." From the foregoing it appears that the disposition of the salt on hand was as early as October, committed by Ruffner, Donnally & Co. by their said agent, as well as one of the plaintiffs to the judgment and discretion of Hewitt, Kercheval & Co. and in the exercise of that judgment and discretion which they were desired to exercise, they forwarded the three thousand one hundred and eighteen barrels of salt to country agents and made their charges therefor, as rendered. And from the evidence of Cochran it was part of the contract and understanding between the parties at the time of the transfer of the agency from Hewitt, Kercheval & Co. to John J. Roe & Co., that Hewitt, Kercheval & Co. should receive the twenty-five cents per barrel for forwarding to country agents. It is quite probable that if Ruffner, Donnally & Co. had left the agency with Roe & Co., that there never would have been any confusion or difficulty about either this charge for forwarding, or drayage on the six thousand seven hundred barrels of salt turned over to John J. Roe & Co., or the charges on collections for salt forwarded to country agents. The whole of this difficulty was produced by Ruffner, Donnally & Co. transferring and turning over the agency from Roe & Co. to Humphrey, Tutt & Terry in which Hewitt, Kercheval & Co. had no lot or part. The disposition of the salt being expressly committed to the

judgment of Hewitt, Kercheval & Co. and they having exercised that judgment and acted therein as factors, in the absence of evidence to the contrary, it must be presumed that they acted in good faith and with reasonable prudence, under the circumstances. There is no evidence showing that Hewitt, Kercheval & Co. acted in bad faith toward Ruffner, Donnally & Co. in forwarding the salt to country agents at the time, and under the circumstances, they did. It is proven that Hewitt, Kercheval & Co. were active, energetic merchants and sold all the salt they could. Under the circumstances it can not be considered or held that Hewitt, Kercheval & Co. disobeyed instructions in forwarding the salt to the country and incurred a liability to Ruffner, Donnally & Co. for damages therefor. The charges for wood for dunnage and for money paid for labor about the necessary protection of salt at levee from freshet in the river it seems to me, from the case, as it appears, must be held to have been acquiesced in and assented to by Ruffner, Donnally & Co. as being correct and just.

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There is no charge of fraud in the bill against Hewitt, Kercheval & Co. as to the matters I have been considering; nor are any errors or mistakes in the said final settlement with them pointed out or specifically stated in the bill. It is true they file as part of the bill the said paper writing "O. C." but that paper does not, on its face, purport to apply to Hewitt, Kercheval & Co., as it is made out specifically against Hewitt, Roe & Co.—But even though it be allowed that the part of the charges contained in paper "O. C" may, under the allegations of the bill, be reasonably construed to apply to Hewitt, Kercheval & Co., still the bill takes no notice of the settlement and payment of Hewitt, Kercheval & Co. and does not attempt to surcharge or falsify the settlement. And in addition thereto the evidence sustains the charges as made by Hewitt, Kercheval & Co. against Ruffner, Donnally & Co., in their various accounts rendered. The

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letter of Ruffner, Donnally & Co. written by their agent Smith, to Hewitt, Kercheval & Co., on the 11th April, 1856, and other letters in the record, expressly authorize Hewitt, Kercheval & Co. to send a special messenger to the country to close up country consignments at the expense of Ruffner, Donnally & Co. Printed record, 230.

I have not been able to find any evidence to justify the commissioner in concluding that the four hundred and seventy-three barrels in his report named, was used for filling up, simply to show how to account for it. The evidence of Cochran specifically proves the charge of \$1,000, for cooperage in commissioner's report mentioned, to be correct and reasonable, and so of all or nearly all the other charges made by Hewitt, Kercheval & Co., in their accounts against Ruffner, Donnally & Co.; and I do not think his evidence is impeached or shown to be unworthy of credit. Many of the charges came under his personal notice and supervision when made, and he was better qualified to testify correctly as to them, perhaps, than any other person, not interested. He was the clerk of Hewitt, Kercheval & Co., and familiar with most of the transactions. Upon the whole and without further specifications, it seems to me, that the charges of Hewitt, Kercheval & Co., made in their accounts rendered to Ruffner, Donnally & Co., are sustained by the evidence and course of business of the parties.

The charge of the commissioner of \$2,570.29 and \$616.84 interest for error in the report of Hewitt, Kercheval & Co., of sales of six thousand two hundred and sixty-nine barrels of salt in 1856, is, I think, unauthorized and unsupported. It is not claimed in the bill or any paper filed therewith. They report the sale of this salt at \$2.35 per barrel and the commissioner charges them forty-one cents on the barrel more, simply because Hewitt, Kercheval & Co., sold salt of Ruffner, Hale & Co., at \$2.76 per barrel during the same year. The evidence shows that the salt of Ruffner, Hale & Co., sold in that year was new salt and in good cooperage and full weight,

and that under the circumstances, the old salt of Ruffner, <sup>1874.</sup> Donnally & Co., with bad cooperage and slack weight, <sup>June Term.</sup> could not be expected to command as full price as the <sup>Ruffner,</sup> salt of Ruffner, Hale & Co.; and Smith, the agent, <sup>Donnally & Co.,</sup> evidently so considered. The sale of the salt, and at the <sup>v.</sup> prices at which it was sold, in each month of the year <sup>Hewitt,</sup> 1856, were reported from time to time to Ruffner, Don- <sup>Kercheval & Co.</sup> nally & Co., and no objection was ever made to the price at which this salt was sold until it was done before the commissioner in this case. I do not think there is evidence in the cause sustaining this charge of the commissioner either on the ground of mistake or bad faith on the part of Hewitt, Kercheval & Co., but the contrary.

The charge of \$8,555.68 and interest \$2,053.36, made in the commissioner's report for the three thousand one hundred and eighteen barrels of salt shipped to the country, at \$2.76 barrel, is, I think, unauthorized. This is the same three thousand one hundred and eighteen barrels of which I have before spoken as having been shipped to country agents.

The charge of \$18,381.60 and interest \$4,411.56, for six thousand six hundred and sixty barrels of salt, which as the commissioner says from the negligence and omission of duty of Hewitt, Kercheval & Co., as consignees, was not sold, is unsupported by the evidence or law. This is the same salt that was turned over by Hewitt, Kercheval & Co., to John J. Roe & Co., minus forty barrels thereof sold by Roe & Co., and the same with which the commissioner has charged Humphrey, Tutt & Terry, in their account.

It appears that about the first of the year 1856 another firm and partnership of Ruffner, Hale & Co. was formed for the purpose of buying and selling Kanawha salt in the West and elsewhere. This firm, as alleged in the bill, was composed of twelve persons, and it is proven that all of these persons, including Lewis Ruffner, except two, were members of the firm of Ruffner, Donnally & Co. The bill alleges that the firm of

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Ruffner, Donnally & Co. expired with the year 1855, and only existed after that time "for the purpose of closing and winding up its business." From August 1, 1854, to the expiration of the year 1855, and afterwards till near the close of 1856, Hewitt, Kercheval & Co. continued the agents of Ruffner, Donnally & Co. in the selling their salt on hand and undisposed of in St. Louis, at the expiration of 1855. Ruffner, Donnally & Co. ceased to purchase salt after 1855, and they shipped no salt to St. Louis after the year 1855.

In the spring of 1856, Hewitt, Kercheval & Co., at the instance of Lewis Ruffner, who was then an active partner of the firm of Ruffner, Hale & Co., as well as a member of the firm of Ruffner, Donnally & Co., took the agency for the sale of the Kanawha salt, shipped by Ruffner, Hale & Co. to St. Louis, for sale, and for forwarding to country agents, and during that year they sold some nine thousand four hundred and forty barrels, which brought in the gross \$2.76 per barrel.

I am unable to understand why the commissioner charged Hewitt, Kercheval & Co. with this six thousand six hundred and sixty barrels of salt, unless it was because he thought Hewitt, Kercheval & Co. were guilty of negligence and violation of duty as factors of Ruffner, Donnally & Co. in accepting the agency for the sale of the salt of Ruffner, Hale & Co., and in not selling the six thousand six hundred and sixty barrels of salt instead of the salt of Ruffner, Donnally & Co., and at the same price, and that if the salt of Ruffner, Hale & Co. had been sold by them, the persons who bought the Ruffner, Hale & Co. salt, would have bought the old salt of Ruffner, Donnally & Co. at the same price. Now, it must be remembered that Hewitt, Kercheval & Co. did sell of the old salt of Ruffner, Donnally & Co. six thousand two hundred and sixty-nine barrels during that year. And Hewitt, Kercheval & Co. deny that Ruffner, Donnally & Co. had any such right, as that Hewitt, Kercheval & Co. could violate it by acting for Ruffner, Hale &

Co. in the sale of Kanawha salt for them; that they were free and independent commission merchants, and under no obligation of contract or otherwise not to sell for Ruffner, Hale & Co., and they would in no event allow themselves to come under any such obligation to Ruffner, Donnally & Co., or to any other firm or person. And that it was understood and desired by Ruffner, Donnally & Co. and Ruffner, Hale & Co. that they should take charge of and manage the salt business for Ruffner, Hale & Co. at St. Louis, and thus prevent all coalition, and shut out competition, and so avoid a decline in price, which, owing to the fact that Ruffner, Donnally & Co's salt was old, out of condition and unsaleable, would have been specially oppressive upon them. Hewitt, Kercheval & Co., deny that they undertook or promised to close out the salt of Ruffner, Donnally & Co. in 1856, as charged in the bill.

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They further say, substantially, that in making, and in endeavoring, to make sales of the salt of Ruffner, Donnally & Co. and Ruffner, Hale & Co. they gave preference to the salt of Ruffner, Donnally & Co. and sold all they could of it. The commissioners in making this large charge against Hewitt, Kercheval & Co. is to my mind clearly not sustained by the evidence or facts in the case and the law as applicable thereto.

*First.* Because the correspondence of J. B. Smith, as the agent of Ruffner, Donnally & Co. with Hewitt, Kercheval & Co. on the 10th and 30th of March, 1856, and of L. Ruffner one of the plaintiffs, on the 1st April, 1856, and of Ruffner, Donnally & Co., by said Smith, on the 4th of April, 1856, and other facts and circumstances appearing in the cause, show that Hewitt, Kercheval & Co. took the agency for the sale of the salt of Ruffner, Hale & Co., at St. Louis, with the knowledge and consent of Ruffner, Donnally & Co.

*Second.* That the salt of Ruffner, Donnally & Co., which was unsold on the 22d of December, 1856, by Hewitt, Kercheval & Co. and which was turned over to



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tiffs, recognized as the salt of Ruffner, Donnally & Co.,  
Ruffner, and also by Ruffner, Donnally & Co., by their general  
Donnally & Co. v. agent, John B. Smith and that the transfer of the agency  
Hewitt, Kercheval & Co. of that salt to John J. Roe & Co. as their agents and as  
their salt was fully recognized and assented to by Ruff-  
ner, Donnally & Co.; that Ruffner, Donnally & Co and  
Ruffner, Hale & Co., kept the agency of the sale of their  
salt with the same persons in St. Louis from the time the  
salt of Ruffner, Hale & Co. first appeared there in mar-  
ket, and when the agency of the one was transferred, the  
agency of the other was, also, to the same person, and  
and without objection, but in fact by consent. When  
Smith as the general agent of Ruffner, Donnally & Co.,  
for the West, sanctioned and consented to the transfer of  
the salt of Ruffner, Donnally & Co. to John J. Roe &  
Co., he knew that the agency for the sale of the salt of  
Ruffner, Hale & Co. was also transferred to them; and so  
of the transfer to Humphrey, Tutt & Terry afterwards  
made. Smith also became the local agent of Ruffner,  
Hale & Co. at Louisville, in the spring of 1856, while he  
was the agent of Ruffner, Donnally & Co. as aforesaid,  
and he continued in both agencies so far as I am able to  
see, without objection.

*Third.* When the salt was transferred to John J. Roe & Co., no claim, or pretence of claim, was urged or intimated as against Hewitt, Kercheval & Co., for any such cause, nor was any such claim made at the time Hewitt, Kercheval & Co., returned their final accounts current showing the debit of Ruffner, Donnally & Co., to them or within any reasonable time thereafter, nor indeed, so far as the record shows, until the filing of the bill in this cause in the Spring of 1859; and then the claim was not for the value of the salt. And, further, in January, 1857, long after all the facts to this respect were fully known and after Hewitt, Kercheval & Co., had rendered their final accounts current, Ruffner, Donnally & Co., by their agent Smith, for and on behalf of Ruffner, Don-

nally & Co., directed the balance due Hewitt, Kercheval & Co., according to their final account current to be paid, and it was so accordingly paid.

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Without deciding the abstract proposition of law, whether a factor engaged in the selling of salt for another, is guilty of a violation of duty by simply becoming the factor of a third person, without consent, for the sale of salt at the same time and place, I feel constrained to hold, in this case, that it does not appear that Hewitt, Kercheval & Co., under the facts and circumstances disclosed by the record, were guilty of negligence or violation of duty to Ruffner, Donnally & Co., in acting as the factors of Ruffner, Hale & Co., for the sale of their salt in the year 1856. And if they had violated their duty in this respect, they would not thereby necessarily become chargeable by Ruffner, Donnally & Co., with the value of their salt not sold.

The charge in the commissioner's report against Hewitt, Kercheval & Co., of \$1,818.01 and interest \$436.32 relating to said six thousand two hundred and sixty-nine barrels of salt sold in 1856, and being the last item in the commissioner's account "B." against Hewitt, Kercheval & Co., is clearly not supported, and to a great degree, for the reasons herein stated, in considering the charges of forty-one cents per barrel for the same six thousand two hundred and sixty-nine barrels sold in 1856. On the whole, therefore, there was no error in the decree of the court in sustaining the exceptions of Hewitt, Kercheval & Co., to the said report of commissioner Laidley.

The plaintiff filed no exceptions to the report of the commissioner as to the accounts of Hewitt, Roe & Co., or Hewitt, Kercheval & Co., or either of them. The commissioner referred to the court the matter of the record of Houseman, Smith & Co., against Hewitt, Kercheval & Co., filed as evidence before him by Hewitt, Kercheval & Co., for its judgment, and the court decided that the amount of the money shown by the said record

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Ruffner, against the complainants, and accordingly, for this ac-  
Donnally & Co. count, decreed in favor of Hewitt, Kercheval & Co.,  
v. Hewitt, against the plaintiffs for the sum of \$1,348,21, being the  
Kercheval & Co. principal and interest of the recovery aforesaid due at  
the date of the decree, and also for the further sum of  
\$161,50, being the principal and interest paid by them  
for defending the same.

It is argued here that it was error in the circuit court to allow Hewitt, Kercheval & Co, this amount or any other amount on account of the recovery of Houseman, Smith & Co., against Hewitt, Kercheval & Co. The facts in relation to this matter as disclosed by the record are substantially as follows. viz: That the instructions of Ruffner, Donnally & Co., to Hewitt, Kercheval & Co., were to sell their salt by the barrel according to the lick weight, deducting therefrom a tare of twenty-five pounds on the barrel. In the year 1855, Hewitt, Kercheval & Co., as the factors of Ruffner, Donnally & Co., sold to Houseman, Smith & Co., twenty-six hundred barrels of salt at forty cents per bushel, according to lick weight, and in accordance with their instructions, as they contend, and delivered, or caused to be delivered, the same to Houseman, Smith & Co. Afterwards, in February, 1856, Houseman, Smith & Co., brought suit to recover damages from Hewitt, Kercheval & Co., on account of the shortness of the weight of the salt—They alleging that they bought eighteen thousand seven hundred and sixty-six and five-eighths bushels of salt as being contained in said two thousand six hundred barrels, when in fact there was only fifteen thousand nine hundred and forty-two bushels of salt in said two thousand six hundred barrels.

Hewitt, Kercheval & Co., shortly after said suit was brought, informed Ruffner, Donnally & Co., thereof, and Ruffner, Donnally & Co., by their agent, were informed of the suit by letter, and during the pendency thereof allowed and paid, without objection, some costs incurred

by Hewitt, Kercheval & Co., in preparing for making defence thereto, as may be seen by some of the accounts current of Hewitt, Kercheval & Co., rendered in 1856. During the pendency of the suit Hewitt, Kercheval & Co. employed counsel and made defence to the suit, and the plea filed by them was, substantially, that they sold to Houseman, Smith & Co., two thousand six hundred barrels of salt at the measure weight marked on the barrels, less twenty-five pounds per barrel as tare, at which weights the said twenty-six hundred barrels, contained eighteen thousand seven hundred and forty-six and thirty-three hundredths bushels of salt; that at the time of the sale of the salt it was proposed by James Houseman, one of the plaintiffs therein, that Hewitt, Kercheval & Co., should sell the salt to the plaintiffs at forty cents per bushel, at actual measurement; that the number of bushels should be ascertained by weighing the salt or by re-weighing a part, and thus finding the falling off from the original, or lick weight, as marked upon the barrels, and making a corresponding deduction or average loss on the entire lot of salt: Both of which propositions were refused by Hewitt, Kercheval & Co., who did, in fact, only sell the salt at the original lick weights, as marked on the barrels, less the twenty-five pounds per barrel, as tare &c. In October, 1858, at the trial of the cause, Houseman, Smith & Co., recovered judgment against Hewitt, Kercheval & Co., for \$787.38 debt, together with \$51.95 costs, which Hewitt, Kercheval & Co., paid, and also paid \$100, attorney's fee for defence, of which Hewitt, Kercheval & Co., notified Ruffner, Donnally & Co., after the recovery, by letter dated October 16th, 1858, and required of Ruffner, Donnally & Co. payment thereof. On the 16th of February 1856, Ruffner, Donnally & Co., by their agent, Smith, wrote Hewitt, Kercheval & Co., in answer to their letter informing them that the suit was brought as follows: "We are sorry Houseman, Smith & Co., chose to trouble you in this matter, as

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we are at the same time confident they got just what they bought, and as they bought it, we would prefer that the thing should be arbitrated, as it is less trouble; but we will say to you, act in the premises as if it were your own and we will be satisfied with whatever you do." Printed record 330. See also in printed record 331, for a further letter. Hewitt, Kercheval & Co., accounted to Ruffner, Donnally & Co., for the salt so sold to Housman, Smith & Co., and for the full amount received. The case was not arbitrated as Hewitt, Kercheval & Co. seem to have desired it should be.

The general doctrine seems to be that if an agent has, at the express or the implied request of his principal, necessarily incurred expenses in carrying on or defending suits, for the benefit of his principal, these expenses must be borne by the latter, and the agent will be entitled to recover them from him. And if an agent has, without his own default, incurred losses or damages, in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation therefor. Story on Agency secs. 235 and 339 and cases there cited. It is not every loss or damage, for which the agent will be entitled to re-imbursement from his principal. The latter is liable only for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency. If, therefore, the losses or damages are casual, accidental, oblique or remote, the principal is not liable therefor. In short, the agency must be the cause, and not merely the occasion, of the losses or damages, to found a just right to re-imbursement. Story on Agency sec. 341.

Ruffner, Donnally & Co., had no information touching the said suit or its merits before the trial thereof, except such as they derived from Hewitt, Kercheval & Co., by letter, and of course what they said and did in relation thereto, by letter or otherwise, was on the faith of the correctness of that information. So far as I can see

from the record in the case of Housman, Smith & Co.,  
 against Hewitt, Kercheval & Co., the only issue pre-  
 sented at the trial by the pleadings was whether Hewitt,  
 Kercheval & Co., had sold the salt by lick weight or ac-  
 tual weight, and it by lick weight whether they had de-  
 livered the full amount. The issue in the case was found  
 against Hewitt, Kercheval & Co., that is to say the jury  
 upon the issue, must have considered, either that the  
 whole amount sold was not delivered, if the sale was by  
 lick weight, or that the sale was not by lick weight but  
 actual weight—otherwise they could not have found the  
 verdict for Housman, Smith & Co., against Hewitt, Ker-  
 cheval & Co. The court seems to have been satisfied  
 with the verdict, as it rendered judgment for the full  
 amount thereof and costs. If Hewitt, Kercheval & Co.  
 sold by lick weight and did not deliver the full amount  
 and the recovery was on that account, then the recovery  
 was because of their default. If they sold by actual weight  
 and not lick weight and delivered the amount sold accord-  
 ing to lick weight, but not according to actual weight and  
 the recovery was on that account, then they disobeyed their  
 instructions and the recovery was because of their default.  
 The record of that cause, as presented, is strong evidence  
 against the right of Hewitt, Kercheval & Co., to re-  
 cover against Ruffner, Donnally & Co., and I do not  
 think its force is overcome by other evidence in the rec-  
 ord. It is true the record proves the recovery, but when  
 taken in connection with the evidence, as to the instruc-  
 tions of Hewitt, Kercheval & Co., by Ruffner, Don-  
 nally & Co., it also tends strongly to prove that the re-  
 covery must have been had by reason of the default or  
 neglect of Hewitt, Kercheval & Co., either in the sale or  
 in making a reasonably proper and diligent defence to  
 the suit. I think the circuit court, under all the evi-  
 dence, erred in decreeing in favor of Hewitt, Kercheval  
 & Co., against Ruffner, Donnally & Co., for the amount  
 of the recovery of Housman, Smith & Co.

The firm of John J. Roe & Co. was formed about 1st

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January, 1856. This firm, as I have stated, was composed, alone, of Roe & Moore, and they were commission merchants in St. Louis. As heretofore stated, the firm of Hewitt, Kercheval & Co., at or about the time of their dissolution, and about the 22d of December, 1856, by an arrangement of Hewitt, Kercheval & Co., Roe & Co. and plaintiff Lewis Ruffner, which was recognized, sanctioned, ratified and acted on by Ruffner, Donnally & Co., by their general agent John B. Smith, Hewitt, Kercheval & Co. transferred the salt of Ruffner, Donnally & Co., in their hands in St. Louis, not disposed of, and that shipped to country agents by them and Hewitt, Roe & Co., which had not been fully accounted for, and all the notes, bills and evidences of debt, of Ruffner, Donnally & Co., in their hands to said Roe, & Co., and Roe & Co. received the same and held the agency as the agents and factors of Ruffner, Donnally & Co. until the — day of January, 1857, about one month only. During that time the firm of Ruffner, Donnally & Co. being pressed for money to meet their engagements, and protect their credit, through their said agent, Smith, procured Roe & Co. to make advancements to Ruffner, Donnally & Co. by acceptances, &c. on the faith of the salt in their hands for sale and that in hands of country agents, notes, &c., to the amount of some \$25,000.00.

Roe & Co., during said month, sold forty barrels of the salt turned over to them for which they rendered an account to Ruffner, Donnally & Co., about the — day of January, 1857, in which it will be seen that they charge on each barrel sold 25—8 cents. that is to say seventeen cents per barrel according to the arrangement to which I have before alluded. Also on the — day of January, 1857, they rendered to Ruffner, Donnally & Co. an account current to date, stating their charges against Ruffner, Donnally & Co. for cooperage and other things in the commissioner's report mentioned. To this account current and report of sales no objection appears to have been made or pointed out, in any reasonable time, nor indeed till long after the commencement of this suit.

About the — day of January, 1857, John J. Roe & Co. by and in pursuance of an arrangement made and agreed upon by Humphrey, Tutt & Terry, John J. Roe & Co. and plaintiff Lewis Ruffner, sanctioned, recognized and ratified by Ruffner, Donnally & Co. by their said agent, John B. Smith, transferred to Humphrey, Tutt & Terry the balance of the salt in their hands in St. Louis unsold, and also seven thousand seven hundred and seventy barrels of salt shipped to country agents by Hewitt, Kercheval & Co., not fully accounted for and \$19,034.56 of bills and notes belonging to Ruffner, Donnally & Co. which seems to be \$1,883.39 more than received from Hewitt, Kercheval & Co. and seven hundred and eighty-nine barrels of salt less than was shipped by Hewitt, Kercheval & Co. to country agents and turned over to John J. Roe & Co. John J. Roe & Co. retained the unsettled salt matters placed by Hewitt, Roe & Co. in the hands of country agents in pursuance of said arrangement to indemnify them against the indebtedness of Ruffner, Donnally & Co. to them on acceptances, &c. Roe & Co. took from Humphrey, Tutt & Terry receipts, &c., which fully appear in the record.

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Afterwards, in October, 1857, John J. Roe & Co., had and made a full adjustment and settlement of their accounts and claims, and of the salt placed by Hewitt, Roe & Co., in the hands of country agents &c., with plaintiff Lewis Ruffner and said John B. Smith, agent of Ruffner, & Co., and upon settlement and adjustment the said Smith with the full knowledge and consent of said Ruffner, in consideration of the sum of \$2,000.00 paid by said Roe & Co., to Ruffner, Donnally & Co., gave to said Roe & Co., a receipt in full settlement of all claims against them and against Hewitt, Roe & Co., and relinquished and transferred to them all notes, accounts, salt held by country agents, and all evidences of indebtedness to Ruffner, Donnally & Co., or to them for or on account, growing out of previous transactions with them as the agents of Ruffner, Donnally & Co., for the sale of



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Ruffner, Donnally & Co., in their letter of the 9th of  
October. This settlement and adjustment must have  
been made with a knowledge of all the facts at the time by  
Ruffner and Smith, the agent; and while these facts were  
fresh and familiar said Smith, the plaintiff's witness, in his  
deposition, says he directed and sanctioned the transfer  
of the salt and other effects of Ruffner, Donnally & Co.,  
in January, 1857, from John J. Roe & Co., to Humphrey  
Tutt & Terry. He also says, substantially, that all his  
acts as agent of Ruffner, Donnally & Co., up to the date  
of his deposition, were recognized by Ruffner, Donnally  
& Co., and that John J. Roe & Co., had seven thousand  
four hundred and five barrels of salt transferred to them,  
it being the balance of Hewitt, Roe & Co's., salt which  
they settled for, and that the receipt, to which I have re-  
ferred is correct, that the receipt was intended to close  
said Roe & Co's., account in full; also the seven thousand  
four hundred and five barrels of salt transferred to said Roe  
& Co from Hewitt, Roe & Co.; that the seven thousand  
four hundred and five barrels of salt was all Hewitt, Roe  
& Co., had, and that has been closed and paid for by said  
Roe & Co. Ruffner, Donnally & Co., in the letter of  
13th November, 1857, written by said Smith enclosing  
said receipt to Roe & Co., to which I have already re-  
ferred says that the account of said Roe & Co., and  
Hewitt, Roe & Co., stood open on their books, and asks  
for a copy of Roe & Co's., account against Ruffner, Don-  
nally & Co.; also of Hewitt, Roe & Co., against same  
that Ruffner, Donnally & Co., might enter them, and  
close and square both accounts, saying that the accounts  
asked for had been rendered, but had been lost or des-  
troyed. In accordance with this request said Roe & Co.,  
did send to Ruffner, Donnally & Co., their final account  
current or a copy thereof, on the 24th November, 1857,  
which appears in the record, to which no objection or  
exception appears to have been made in any way or re-  
spect or to said receipt, until in April, 1860, in the ex-

amination of said John B. Smith, and afterwards in 1861 before the commissioner, as per his report. This final account closed and squared the accounts of Roe & Co., and Ruffner, Donnally & Co. The plaintiffs must have known of this receipt and settlement and of Roe & Co's, accounts and accounts rendered before and when they filed their bill; still the bill makes no reference to the receipt or settlement and does not surcharge or falsify it, or attempt to do so, nor in fact does the bill, as I understand it, claim, expressly, that said Roe & Co., are indebted, to Ruffner Donnally & Co., on any account. It does claim, expressly that the other firms are each indebted, and asks a settlement of the accounts of Roe & Co., as well as the others, as though no settlement of their accounts was ever made. Fraud is not alleged or proved in the transactions of Roe & Co., or in the said settlement, nor is any sufficient reason shown why the returns of Roe & Co., and said settlement, should be disturbed. Much of the law I have stated and much I have said in considering the case as to Hewitt, Roe & Co., applies directly to the accounts of John J. Roe & Co., and the said settlement thereof. The receipt and settlement are set up and relied on by Roe & Co., by their answer filed, which is sworn to by John J. Roe. The answer of Roe & Co. is responsive to the bill, and expressly denies any and all indebtedness or liability to Ruffner, Donnally & Co., and the answer, and indeed all the answers were filed, and the most of the proceedings had in the cause several years prior to 1869, when the Code of West Virginia took effect. Entertaining these views I do not feel at liberty to determine that there is error in the decree of the circuit court in sustaining the exceptions of John J. Roe & Co., to the commissioner's report.

I have hereinbefore ascertained and stated the amount of salt on hand in St. Louis, and in the hands of country agents, shipped by Hewitt, Kercheval & Co., notes, bills, &c., that were transferred from John J. Roe & Co. to

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June Term. Humphrey, Tutt & Terry, and I have stated that at the time the agency was transferred from Hewitt, Kercheval & Co. to John J. Roe & Co., Ruffner, Donnally & Co. were indebted to Hewitt, Kercheval & Co. in the sum of \$23,769.08, and that \$23,750 thereof was paid to or in relief of Hewitt, Kercheval & Co. by Humphrey, Tutt & Terry after the agency was transferred to the latter, by way of advancement to Ruffner, Donnally & Co., at the instance and request of Lewis Ruffner, one of the plaintiffs, and also of John B. Smith, the agent of Ruffner, Donnally & Co. It further appears that Humphrey, Tutt & Terry, after the agency was transferred to them, at the instance and request of said Ruffner and of said Smith, as agent as aforesaid, made through said Smith, further advancements to Ruffner, Donnally & Co., upon bills or drafts of Ruffner, Donnally & Co., drawn and endorsed by said Smith, as agent of Ruffner, Donnally & Co., to the amount of \$30,000, which was applied by said Smith, as such agent, to the use of Ruffner, Donnally & Co. in the payment of their just debts. The \$23,750 due to Hewitt, Kercheval & Co., was not payable at the time of the transfer of the agency from Hewitt, Kercheval & Co. to John J. Roe & Co. It was and became payable during the ensuing spring of 1857, and it was for bills or drafts drawn and endorsed by said Smith, as agent as aforesaid upon Hewitt, Kercheval & Co., and by Hewitt, Kercheval & Co. accepted for the use and benefit of Ruffner, Donnally & Co.; and Smith, as such agent, received the proceeds thereof and applied them to the use of Ruffner, Donnally & Co. in the payment of their just debts. Under these circumstances, it is clear that Ruffner, Donnally & Co. received the full benefit of both of said advancements in the extinguishment of their just debts and liabilities and to the full extent thereof. The commissioner, in his report, page 180 printed record, says the payment by Hewitt, Kercheval & Co. of the acceptance is not disputed;” and in his report as to the accounts of Ruffner,

Donnally & Co. and Humphrey, Tutt & Terry, he allows  
 Humphrey, Tutt & Terry the full amount thereof, with in-  
 terest. To the action of the commissioner, Ruffner,  
 Donnally & Co., by their counsel, filed exceptions.

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The *first* exception is as to the several items making the said \$23,750, of acceptances of Hewitt, Kercheval & Co., and the exception is that "Ruffner, Donnally & Co., without express promise in writing, are not bound to pay the debt of another, nor had Hewitt, Kercheval & Co., on which to base on the part of Humphrey, Tutt & Terry, a promise to pay their acceptances, because the transaction was fraudulent on the part of Hewitt, Kercheval & Co., and Humphrey, Tutt & Terry must look to Hewitt, Kercheval & Co., for their compensation. And Ruffner, Donnally & Co.'s exception to the several items making said \$30,000.00, being acceptances by Humphrey, Tutt & Terry, of ten bills drawn by J. B. Smith, as agent of Ruffner, Donnally & Co.; that the bills were drawn after the partnership of Ruffner, Donnally & Co., had expired by limitation, and while the Company only existed for the purpose of winding up and closing its business, all of which was known to the acceptors, as shown by the evidence in the cause." At the time of the transfer of the agency from Hewitt, Kercheval & Co., to John J. Roe & Co., by Ruffner, one of the plaintiffs, and approved, ratified and sanctioned by said Smith, as the agent of Ruffner, Donnally & Co., having full control of their salt business at St. Louis, and in the West, generally, the said debt to Hewitt, Kercheval & Co., was known and fully recognized by both Ruffner and said Smith, and it was a part of the contract and arrangement of transfer of the agency, so ratified and sanctioned by said Smith, that John J. Roe & Co., should pay to Hewitt, Kercheval & Co., or in their relief by way of advancement to Ruffner, Donnally & Co., the said \$23,750.00. Before the \$23,750.00 was paid by John J. Roe & Co., the agency was trans-

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ferred, as before stated, from John J. Roe & Co., to Humphrey, Tutt & Terry, and it was a part of the arrangement and contract of the last named transfer of agency that Humphrey, Tutt & Terry should pay the \$23,750 to, or in relief Hewitt, Kercheval & Co., by way of advancement and for the use and benefit of Ruffner, Donnally & Co. This last arrangement of transfer was also made by said Ruffner, and fully sanctioned and ratified by Smith, as agent, as aforesaid. And it was by virtue of, and in pursuance of this arrangement, and at the instance and request of both Ruffner and said Smith, as agent, that Humphrey, Tutt & Terry did pay said \$23,750, of which Ruffner, Donnally & Co., had received the full benefit, and, in justice, was their honest debt, for which they had received full consideration in money. The payment of this debt for Ruffner, Donnally & Co., appears to have been made in good faith by Humphrey, Tutt & Terry, and was not done officiously. If this \$23,750 can, in point of law and justice, be held to be the debt of Ruffner, Donnally & Co., and the payment thereof not being officious, on the part of Humphrey, Tutt & Terry, then, according to the principles decided in the case of *Brown's Exor. v. Higginbotham*, 5 Leigh, 583, Ruffner, Donnally & Co., and each member of that firm, are, justly and legally, liable to Humphrey, Tutt & Terry, therefor, and will be so held in equity.

This leads me to the enquiry, as to whether the said debt of \$23,750 was, in point of law and justice, the debt of Ruffner, Donnally & Co. In other words, if Hewitt, Kercheval & Co. had paid said acceptances, in lieu of Humphrey, Tutt & Terry, could Hewitt, Kercheval & Co., have recovered the same from Ruffner, Donnally & Co., at law or in equity?

At the expiration of the year 1855, we have seen that Ruffner, Donnally & Co., had a large amount of salt on hand in different parts of the country, as well as choses in action, and, perhaps, other property undisposed of and unsettled, and that their indebtedness was very large.

This immense partnership and firm's business was then unsettled. It had to be settled, by some person or persons and the debts and liabilities paid. We have seen by the authorities already quoted the power and authority of each member of the firm after dissolution or the expiration of the partnership, which is the same to act for and on behalf of the other members and so as to bind them in settling up the business and affairs of the firm.—It is unnecessary for me here to repeat these authorities. I only, again refer to them. I have before referred to the power of attorney made to J. B. Smith when he was first appointed agent and quoted therefrom, and I have also quoted the notice published by Ruffner, Donnally & Co., of the expiration of the partnership, and authorizing John B. Smith to use the "name of Ruffner, Donnally & Co., in liquidation." We have seen that said Smith had sole control of Ruffner, Donnally & Co.'s business at St. Louis after the year 1855, that he reported his proceedings and actions as their agent to Ruffner, Donnally & Co., at Kanawha county, quarterly; that after the expiration of 1855, and in 1856 and 1857, he continued to make bills, drafts, &c., and endorse the same in the name of Ruffner, Donnally & Co., as their agent and raise money thereon and apply the same to the use and benefit of Ruffner, Donnally & Co., in 1856 and 1857, as he did prior to the expiration of 1855; and that he procured money in this way, by way of advancements and collections, from agents at St. Louis and elsewhere, and that it was necessary that he should do this to protect the credit of Ruffner, Donnally & Co., and thereby most probably prevent a multitude of suits and large costs and sacrifices of property of Ruffner, Donnally & Co. All the salt of Ruffner, Donnally & Co., at and after the expiration of the partnership of Ruffner, Donnally, & Co., in states other than Virginia, was liable to be proceeded against and sold by process of attachment by the creditors of Ruffner, Donnally & Co., in the state or states in which it was. This was so in

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1856 and 1857, and if the debts had not been met and paid by Ruffner, Donnally & Co., by Smith as agent, or caused by him to be paid, as they were, the consequence and results to Ruffner, Donnally & Co., might have been ruinous, and in all probability would have been. Smith, we have seen, says that in 1856, he raised and applied in this way, \$500,000, at least, and that he did it in the name and as agent of Ruffner, Donnally & Co., and among others was this \$23,750 of Hewitt, Kercheval & Co. And in 1857 the \$30,000 of Humphrey, Tutt & Terry. And Smith in his deposition, taken by plaintiffs, says in substance, that all his acts as agent of Ruffner, Donnally & Co., done after the execution of said power of attorney and up to the date of his deposition had been recognized by Ruffner, Donnally & Co. What else can we understand by this statement other than that Ruffner, Donnally & Co., had ratified and sanctioned all of his acts as to the matters under consideration, as well as others, as being rightfully done—done by their authority and binding upon them? I apprehend there can be no doubt that the members of a dissolved or expired partnership, may, jointly, appoint an agent or agents to wind up their business, to place their property in the hands of factors for sale, to receive advancements upon their property, from their agents or factors, and to make bills and drafts and endorse and accept the same in the name of the firm, so as to bind them, and this may be done verbally or by writing, and the agency may be implied, inferred or ratified by acquiescence, &c., as in any other case. An agent may, by a verbal authority, or by a mere implied authority, sign or endorse promissory notes for another. Story on Agency, sec. 50.

I do not decide the question of law as to whether the expiration of the partnership *per se* revoked the agency and powers of John B. Smith, under said power of attorney, because it is unnecessary.

I am satisfied from the evidence, papers and exhibits in this cause, and the law bearing on the subject which

I have cited, that, Ruffner, Donnally & Co., did continue the agency of John B. Smith, after the expiration of the year 1855 and during the years 1856 and 1857, in and about their salt business, for the purposes which he acted as their agent in the premises and now under consideration; and especially of placing their property in the hands of factors, changing factors, receiving advancements from the factors in money or raising it by bills or drafts drawn, accepted or endorsed in the firm name of Ruffner, Donnally & Co., by said Smith, as their agent, from the factors, to apply to the payment of their debts as was done in this case by said Smith; and that while said Smith was so acting as the agent of Ruffner, Donnally & Co., they were duly informed thereof from time to time, and fully acquiesced in and ratified all his acts in the premises, including the said \$23,750 and the \$30,000, and that the commissioner justly and properly charged Ruffner, Donnally & Co., in his said report with said \$23,750, and the \$30,000, and that the same constitutes a just debt against Ruffner, Donnally & Co., for which they must account to Humphrey, Tutt & Terry. If Ruffner, Donnally & Co., continued Hewitt, Kercheval & Co., as factors, by their authorized agent, Smith, after 1855, and Smith had authority to receive advancements &c., from the factor to be applied to the payment of the debts of Ruffner, Donnally & Co., then the said advancements of Hewitt, Kercheval & Co., so made in 1856, constituted a lien on the salt, notes and bills receivable in their hands for which they sold salt of Ruffner, Donnally & Co., and they had the right to sell the salt and collect the notes and bills and apply the proceeds as far as necessary to pay their lien or use it by way of set-off. Story on Agency, sections 342, 368, 371. Hewitt, Kercheval & Co., then had a lien on the salt, notes and bills receivable of Ruffner, Donnally & Co., at the time the agency was transferred by them to John J. Roe & Co., and by delivering the same to John J. Roe & Co., for the purposes they did, they lost their

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lien. Story on Agency, sections 366 and 367. And they delivered the salt and notes &c., to John J. Roe & Co., and thereby lost their lien in consideration that John J. Roe & Co., under the arrangement of transfer, was to pay their debt for Ruffner, Donnally & Co. But for this consideration it is more than probable that Hewitt, Kercheval & Co., would not have parted with the possession of the salt and notes in their hands, but would have held them for the security and satisfaction of their debt, as they might have done, as before stated. And when the transfer was made to Humphrey, Tutt & Terry, it was agreed and arranged that Humphrey, Tutt & Terry should pay Hewitt, Kercheval & Co's., debt against Ruffner, Donnally & Co., by way of advancement for Ruffner, Donnally & Co., in lieu of John J. Roe & Co.; and in pursuance of that arrangement, Humphrey, Tutt & Terry did pay the said \$23,750 to, or in relief of, Hewitt, Kercheval & Co. I am unable to see anything fraudulent or wrong in this transaction, or that the statute of frauds, as between Hewitt, Kercheval & Co., and Ruffner, Donnally & Co., or Humphrey, Tutt & Terry and Ruffner, Donnally & Co., applies. But it is clear to my mind that to hold that Ruffner, Donnally & Co., should not be charged with the \$23,750 and \$30,000 so paid by Humphrey, Tutt & Terry, would, under the peculiar circumstances presented by this case, amount to allowing Ruffner, Donnally & Co., to perpetrate a fraud on Humphrey, Tutt & Terry. And not only so, but would establish a precedent that would allow them and others to do the same thing in other cases of similar character. Ruffner, Donnally & Co., in this case call on Humphrey, Tutt & Terry, to account to them for the salt, notes, &c.,—they should be held to account in so far as they have not already done so, but at the same time it is equally just and right that Ruffner, Donnally & Co., should be held to account to Humphrey, Tutt & Terry, for the money so paid to and for them, and of which they received the full benefit.

I do not think the *third* exception of Ruffner, Donnally & Co. is good. Humphrey, Tutt & Terry can not be held as guarantors of the payment of the notes or bills in the exception mentioned. It does not appear that they collected these notes or any part thereof, nor does it appear that they, or any of them, were lost to Ruffner, Donnally & Co., by the negligence of Humphrey, Tutt & Terry. But if anything appears in relation to them it is that they were not collected.

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I think the *fourth* exception of Ruffner, Donnally & Co. is not well taken. Humphrey, Tutt & Terry are charged with this item in the \$11,734.20 of amount realized from salt in the country shipped by Hewitt, Kercheval & Co.

The *fifth* exception of Ruffner, Donnally & Co., so far as relates to the amount allowed on the seven thousand seven hundred and sixty-eight barrels of salt and the four thousand three hundred and six barrels for reasons hereinbefore stated is not well taken.

So much of said exception five, as relates to the residue of the said six thousand six hundred and sixty barrels of salt, after deducting the four thousand three hundred and six barrels, which is called two thousand five hundred barrels in said exception, but which is in fact two thousand three hundred and fifty-four barrels. I will further consider, when I dispose of the questions arising upon the face of so much of the decree appealed from as refers the cause as between Ruffner, Donnally & Co. and Humphrey, Tutt & Terry to Wm. H. Hogeman as special commissioner for an account and directs the basis on which he shall make the same.

The defendants Humphrey, Tutt & Terry also filed exceptions to the report of commissioner Laidley, to exhibits B. and C. thereof, which exceptions I think are mostly though perhaps not altogether, well taken. The charge of six thousand six hundred and sixty barrels of salt \$2.37 per barrel is not authorized by the evidence;

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and seventy barrels at \$2.37 per barrel; and so of the  
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my computation. It is clear, to my mind, that Humphrey, Tutt & Terry should not be charged with the  
\$1,831.63 paid by W. H. Rice to Hewitt, Kercheval & Co. on the shipments of salt made by them to country  
agents which were turned over to Humphrey, Tutt & Terry. It is proven by the evidence of Cochran that  
this money was paid by Rice to Hewitt, Kercheval & Co. and by them accounted for to Ruffner, Donnally & Co.  
And if Humphrey, Tutt & Terry are charged with the whole amount of the salt they should be credited for that  
amount. The charge for cooperage should be allowed under the evidence; also the charge for weighing salt  
and also labor, I think, should be allowed, under the proof in the cause; also the charge for rent and also  
proper commissions. I think the weighing and labor were extraordinary expenses necessarily and reasonably  
incurred about the sale of this salt. It was clearly contemplated that the sales would be made by lick weight,  
but the condition of the salt, its age and deficiency in actual weight, I have no doubt, in some cases, made it  
necessary to weigh the salt in order to be able to sell it, and that in such cases it was to the interest of Ruffner,  
Donnally & Co. at that time, that it should be weighed.

I have said nothing of the drayage charged by Humphrey, Tutt & Terry, on salt sold in the city, but the charge  
for drayage on salt sold from place of storage, ought not to be allowed in addition to commission.

Humphrey, Tutt & Terry should be charged for the four thousand three hundred and six barrels of salt sold in  
St. Louis, the amount received for it, deducting proper commissions and other charges and expenses, above in-  
dicated. I do not think they should be allowed more than seventeen cents commission on the barrel for this  
four thousand three hundred and six barrels, as the dray-

age from line to storage had been paid. For the seven thousand seven hundred and seventy-eight barrels of salt, shipped by Hewitt, Kercheval & Co., to country agents, Humphrey, Tutt & Terry should be charged with what they received thereon, and be allowed reasonable compensation for collecting the same,—they should not be allowed commission on the whole of this salt, as they neither forwarded it to the country agents, nor collected the whole of it,—the amount that was collected by Hewitt, Kercheval & Co. Humphrey, Tutt & Terry should not be allowed commission for collecting, nor should they be allowed commission on the other part which has not been collected. Nor should they be allowed as much commission per barrel for collecting from the said country agents, as if they had forwarded the salt. Humphrey, Tutt & Terry should not be charged, under the circumstances, for any greater amount than they received upon the notes and bills they received from John J. Roe & Co., for Ruffner, Donnally & Co. They should not be charged for the said notes or bills which they did not collect. The court may direct the disposition to be made of the said uncollected notes and bills. So far as the record shows, Humphrey, Tutt & Terry did not make frequent returns of sales and collections, as had been the custom of the former agents and factors who had the agency any considerable time. The only account in the record which was returned to Ruffner, Donnally & Co., is the account filed with the depositions of John B. Smith and John P. Smith, and this account or a copy of it was returned to the agent, John B. Smith, at Louisville, some time in the year 1858. The exact time of its return does not appear. It also appears, that when this account was returned to Smith, he objected to it. Afterwards a copy of the same account was returned to the agent of Ruffner, Donnally & Co., at Kanawha, and settlement and payment to Humphrey, Tutt & Terry, required according to the face of that account, but the ac-

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count was then objected to, also. This is an account current, and contains an account of sales of salt, &c., but it does not state the number of barrels sold, or the price per barrel or bushel; nor does it show the number of barrels unsold. It purports to state the amount collected on consignments to country agents, by Hewitt, Kercheval & Co., and the names of the persons from whom collected, but does not state the number of barrels sold by them, &c., and, it is, in other respects, objectionable,—it makes the balance due to Humphrey, Tutt & Terry, \$32,976.59, or thereabouts. Exhibit A, filed with Humphrey, Tutt & Terry's answer, makes the balance due them, the 1st January, 1859, \$26,845.93. This is, also, an account current, and, it is claimed in the answer, to be, substantially, the same as the other account. Exhibit A, however, is not the same as the other account in some material respects. Exhibit A was never presented to Ruffner, Donnally & Co., or their agents. With the answer is also filed a full and satisfactory statement of the collections, from country agents, for salt shipped by Hewitt, Kercheval & Co., and the number of barrels sold by each of them. This statement is marked Exhibit E. They, also, file with their answer, a satisfactory return of sales of the four thousand three hundred and six barrels of salt, sold by them. They, also, file with their answer, Exhibit C, purporting to be a memorandum, showing number of barrels of Kanawha salt belonging to Ruffner, Donnally & Co., shipped to the country by Humphrey, Tutt & Terry, and the persons and places shipped to. Neither said Exhibits A, B or C, appears to have been presented or returned to Ruffner, Donnally & Co.

Sometime in the year 1858 and after the account had been returned to John B. Smith, and also to Ruffner, Donnally & Co.'s agent at Kanawha, and after the same was objected to, Mr. Broadwell, one of the firm of Humphrey, Tutt & Terry, withdrew the account from both places, with the view of making changes and corrections, and

shortly afterwards, he returned to said Smith a copy of the account so withdrawn. It will be observed that the accounts of Humphrey, Tutt & Terry, under the circumstances above stated, do not occupy the position or have the force of the accounts of Hewitt, Roe & Co., Hewitt, Kercheval & Co., or John J. Roe & Co., or either as an account stated and settled. The greatest weight that can be given to it, if that, is that it will be taken as *prima facie* true, in the absence of other evidence, disproving it in whole or part. Plaintiffs, in their bill, charge that Humphrey, Tutt & Terry received, among other things, salt belonging to them, for which they have not accounted, and for which they refuse to account. They are called on to account for the salt, &c., and it was their duty as the factors of Ruffner, Donnally & Co. to make a full and explicit account of the same in every respect. In their answer, they state of the said six thousand six hundred and sixty barrels of salt turned over to them by John J. Roe & Co., in St. Louis, they sold four thousand and thirty-six barrels, a full account and report of which is given in said Exhibit B, at the aggregate price of \$6,825.01, and that, deducting charges, the net amount, with interest to 31st December, 1858, is \$4,675.75; that "of the remainder of said six thousand six hundred and sixty barrels of salt, one thousand seven hundred and seventy barrels could not be sold in the city, and were sent to the country to divers persons for sale, a correct list of whom, with the quantity in their hands, respectively, is shown by list marked C, leaving five hundred and eighty-four barrels of salt short;" that this loss of said five hundred and eighty-four barrels of salt was unavoidable from the bad condition of the barrels and salt when delivered to them, and from other causes beyond their control. From this statement, taking it as true, we would conclude that the one thousand seven hundred and seventy barrels of salt was all of the six thousand six hundred and sixty barrels that could not be sold, and was not sold in St. Louis by Humphrey, Tutt & Terry, and

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that the six thousand six hundred and sixty barrels were actually short five hundred and eighty-four barrels from the bad condition of the barrels and salt when delivered to them, and from other causes beyond their control and that in fact the one thousand seven hundred seventy barrels of salt were all that were shipped by them from St. Louis. I am unable to give the statement any other construction from the language employed. Humphrey Tutt & Terry took and filed the deposition of Lewis Ruffner, Jr., who was clerk for Humphrey, Tutt & Terry and he states the amount of salt consigned to the country by Humphrey, Tutt & Terry was two thousand one hundred and seventy barrels, and that three hundred and fifty barrels of the salt were sunk in the Missouri river, on the "New St. Paul," while being shipped by Humphrey, Tutt & Terry to the country, and that fifty barrels were shipped by Humphrey, Tutt & Terry to one R. S. Mize, and that one hundred and seventy-five or two hundred barrels were used by Humphrey, Tutt & Terry in filling 'up barrels that were deficient. Metcalf, another witness for Humphrey, Tutt & Terry, says that on his trip or trips to dispose of the salt shipped to the country by Humphrey, Tutt & Terry, he learned that R. S. Mize, of Blue Mills, Missouri, who had fifty barrels, was insolvent. This three hundred and fifty barrels sunk in the river, and the fifty barrels shipped to Mize is no part of the one thousand seven hundred and seventy barrels aforesaid. It is clear, therefore, that the one thousand seven hundred and seventy barrels is not all the six thousand six hundred and sixty barrels of salt that was shipped from St. Louis, but that four hundred additional barrels thereof were shipped by Humphrey, Tutt & Terry. Metcalf also states that he called at Nauvoo to see J. J. Newton to collect for fifty barrels, and he could find no such man or salt, and that he called at Wyandotte, Kansas Territory, to collect of O. P. Beading for fifty barrels and learned that he was dead and insolvent, and found no salt there. Metcalf,

in his deposition and exhibit X, filed therewith as part of his deposition, shows that he sold and settled for nine hundred and forty-three barrels of the salt shipped to the country for the sum of \$514.05, after paying freight and charges of the country agents for which he accounted to Humphrey, Tutt & Terry. This nine hundred and forty-three barrels was evidently a part of the one thousand seven hundred and seventy. Metcalf further states that he made these sales or settlements in the years of 1858 and 1859, but he does not state the time of either year. Humphrey, Tutt & Terry do not, in their answer, give any account of the sale of any part of the one thousand seven hundred and seventy barrels of salt. Their answer was sworn to the 20th of May, 1859, and was filed 22d June, 1859.

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It does not appear from the evidence that more than the nine hundred and forty-three barrels of the one thousand seven hundred and seventy barrels sent to the country has been sold by the persons to whom shipped, or if sold, paid for by the persons in the country to whom it was so shipped. The three hundred and fifty barrels of salt sunk in the Missouri river and the fifty barrels shipped to Mize together with the said one thousand seven hundred and seventy barrels makes two thousand one hundred and seventy barrels of salt testified to by Ruffner, Jr. Said Lewis Ruffner Jr., in his deposition also testifies that at the time said salt was shipped the Missouri river was low, and freights high, and that the shipment of the salt was ill-advised; and his deposition shows that the freight on the salt, so shipped, for shipping it to the country was from seventy cents up to as high as \$2 per barrel and that the salt was shipped in July and August, 1857. The commissioner has not charged Humphrey, Tutt & Terry with the said \$514.05 or any part thereof, in the account or statement as presented by him with his report as to the accounts of Humphrey, Tutt & Terry, or with any part of the two thousand three hundred and fifty-four barrels of salt, residue of the six hun-



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dred and sixty barrels after deducting the four thousand three hundred and six barrels sold. It does not appear that Humphrey, Tutt & Terry received instructions from Ruffner, Donnally & Co., or their agents to ship any part of the six thousand six hundred and sixty barrels of salt to the country; nor does it appear that the shipping of it was in accordance with the general usage of trade, or the usage of the trade between Humphrey, Tutt & Terry and Ruffner, Donnally & Co.; nor does it appear, that the disposition of salt, or any part of it, other than by sale at St. Louis, was committed to the judgment or discretion of Humphrey, Tutt & Terry. I do not think that authority is found in Exhibits one and seven filed by Humphrey, Tutt & Terry with their answer for shipping the salt to the country. Exhibit No. 1 is a letter from said Smith to Lewis Ruffner, dated 1st January, 1857, to which I have before referred, in which Smith directs Ruffner to urge John J. Roe & Co., to close out Ruffner, Donnally & Co's., salt in the city in the spring before new salt will go forward. And exhibit seven is dated 12th March, 1857, and on the subject of the old salt says: "As to the old salt we wish it sold for the best price you can, and, if necessary, to have it put in order to do so." This letter is directed to Humphrey, Tutt & Terry and is signed "Ruffner, Hale & Co.,

JOHN B. SMITH, Agent."

I am unable to discover from the record that Humphrey, Tutt & Terry ever informed Ruffner, Donnally & Co. as to what disposition they had made of the two thousand one hundred and seventy barrels of salt shipped by them to the country or any part thereof prior to the filing of their answer. There has unquestionably been a considerable loss by the shipment of the two thousand one hundred and seventy barrels of salt, as aforesaid, by Humphrey, Tutt & Terry and it must be determined who should under the circumstances sustain that loss, Humphrey, Tutt & Terry or Ruffner, Donnally & Co. A factor is bound not only to good faith but to

reasonable diligence. It is not sufficient that he has been guilty of no fraud, or of no such gross negligence, as would carry with it the insignia of fraud. He is required to act with reasonable care and prudence in his employment. Story on Agency sections 183, 186. Whether the proper degree of diligence and skill, which the law requires of agents in performing their duties, has been applied in a particular trade, employment or business, is for the most part a matter of fact, open for inquiry, and, sometimes involving points of great delicacy and difficulty. The general usages of trade, the common habits of the particular business, and the special mode of dealing between the principal and agent, will often explain and expound the duties required of the agent, as to diligence and skill. As a general rule in the absence of instructions if there be a known usage of trade, or a mode of transacting business, applicable to the particular agency or analogous to it, in such a case it will be the duty of the agent to conform to it; and any departure from it, not required by necessity, will be at the peril of the agent, and involve him in full responsibility for any loss occasioned thereby. *Id.* sections 185, 199. It is the duty of an agent where the business, in which he is employed, admits of it, or requires him to keep regular accounts of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts; and to render such accounts to his principal at all reasonable times, without any suppression, concealment or overcharge. *Id.* section 203. If the agent unnecessarily exceeds his commission, or risks the property of his principal he thereby renders himself responsible to his principal for all losses and damage, which are the natural consequences of his act. And it will constitute no defence for him, that he intended the act to be a benefit to the principal. *Id.* section 192. It does not appear from the evidence that the salt shipped could not have been sold in St. Louis. So far as the evidence proves anything upon this subject,

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The counsel for Humphrey, Tutt & Terry in their exceptions suggest that account as shown in exhibit A. be corrected by the court as follows, viz: that Ruffner, Donnally & Co. be charged with the \$25,482.98, as of September, 1860, as stated and then credited with \$514.03, the amount received for the said nine hundred and forty-three barrels and also credited with \$877, the net value of eight hundred and seventy-seven barrels of the salt unsold at \$1. per barrel. This would make up the one thousand seven hundred and seventy barrels but leaves out the three hundred and fifty sunk and the fifty shipped to R. S. Mize, as shown on pages five hundred and thirty-eight, thirty-nine and forty of the printed record. I find an account headed "Final Settlement" "Messrs. Ruffner, Donnally & Co. In account and interest with Humphrey, Tutt & Terry." This purports to be a final account current between Ruffner, Donnally & Co. and Humphrey, Tutt & Terry, and ascertains the balance due from Ruffner, Donnally & Co. to Humphrey, Tutt & Terry on the 1st day of January, 1859, to be \$19,08.46 and it is certified by Geo. D. Humphrey, as a correct and final settlement of the account of Ruffner, Donnally & Co. in account and interest with Humphrey, Tutt & Terry up to and closing with the 1st of January, 1859, and the account purports to have been sworn to before a notary public. In this account current Humphrey, Tutt & Terry are charged with the net proceeds of seven thousand seven hundred and sixty-eight barrels as per sales rendered \$11,734.20; also net proceeds of sale of four thousand three hundred and six as per sales ren-

dered \$4,675.78; also with net proceeds of one thousand seven hundred and seventy barrels of salt at \$1.58 per barrel, \$2,796.00. The three hundred and fifty barrels sunk in the river are stated and also two hundred and twenty-six barrels short and to refill are mentioned, but no charge to Humphrey, Tutt & Terry is made therefor. Immediately thereunder is written fourteen thousand four hundred and thirty barrels accounted for.

There is nothing in the record that indicates when this account was filed, nor is it stated by whom it was filed. Of it the record says: "the following is a copy of the final settlement of Humphrey, Tutt & Terry's account with Ruffner, Donnally & Co. and filed with the papers of this cause." It purports to have been sworn to before a notary public on the 12th of December, 1868, and the decree appealed from was rendered the 6th of July, 1869. No exceptions are filed to this account. I do not attach much importance to this account; nor do I base my conclusion upon it. I simply refer to it as being a part of the record as presented here. The record is made up without regard to system and is in a mixed and confused condition, and as a consequence it is exceedingly difficult to ascertain what part of the papers were filed before the decree appealed from and what part afterwards, as well as to arrive at the facts of the case.

After much consideration of the facts and peculiar circumstances appearing in the case, I have arrived at the conclusion that Humphrey, Tutt & Terry should be charged in the settlement of their account with the value of the two thousand one hundred and seventy barrels of salt at St. Louis, of Ruffner, Donnally & Co., shipped by Humphrey, Tutt & Terry, from St. Louis, in July and August, 1857—I mean its value in the condition it then was, as near as may be. Humphrey, Tutt & Terry should not be allowed drayage for taking this salt from storage to place of shipment. This would still leave one hundred and fifty-four barrels of the six thousand

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six hundred and sixty uncharged to Humphrey, Tutt & Terry. This amount so left, I think, from the evidence, should not be charged to them, as that amount, at least, seems to have been used for filling up other barrels that were deficient. And I am further of the opinion that the circuit court erred in overruling so much of said fifth exception of plaintiff to the commissioner's report as relates to the residue of the said six thousand six hundred and sixty barrels of salt after deducting the said four thousand three hundred and six barrels sold, being of the opinion that the commissioner ought to have charged Humphrey, Tutt & Terry in their account with the value of two thousand one hundred and seventy barrels thereof

I am further of the opinion that the court, in that part of its decree which refers the cause to a special commissioner and prescribes the basis on which he shall make inquiry and report, should have directed the commissioner to charge Humphrey, Tutt & Terry in the account with the value of said two thousand one hundred and seventy barrels of salt at St. Louis, in the condition it was when shipped therefrom in July and August, 1857, as nearly as may be.

All questions not herein passed upon, which arise or may arise, in this cause, hereafter, are left open, for consideration and adjudication.

For these reasons the decree rendered in this cause by the circuit of Kanawha county, on the 6th day of July, 1869, must be reversed and annulled and the appellants recover against the appellees, Robert M. V. Kercheval surviving partner of Hewitt, Kercheval & Co., and the appellees composing the firm of Humphrey, Tutt & Terry, their costs expended about the prosecution of this appeal.

Hoffman and Moore, Judges, concurred.

Absent, Paull, Judge.

The following is the decree entered in this Court.

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This Court proceeding to render such decree in the cause as the said circuit court shall have rendered, upon the papers, proceedings theretofore had, the depositions and other papers filed, the reports and accounts of commissioner A. T. Laidley and the papers and other evidences filed therewith, the exceptions of Hewitt, Roe & Co., of Hewitt, Kercheval & Co., John J. Roe & Co., Humphrey, Tutt & Terry, defendants, and the exceptions of the plaintiffs Ruffner, Donnally & Co., to said reports read by said circuit court—it is adjudged, ordered and decreed that the exceptions of the said Hewitt, Roe & Co., Hewitt, Kercheval & Co., and John J. Roe Co., and each of them, to said reports of said commissioner Laidley, and each part thereof, be sustained, and that the plaintiffs' bill, as to them, and each of them, be dismissed, and that said Robert M. V. Kercheval surviving partner of the said firm of Hewitt, Kercheval & Co., John J. Roe & Henry J. Moore composing the firm of John J. Roe & Co., recover against the plaintiffs their costs about their defence of this cause expended, and that the exceptions of the plaintiffs filed to said commissioner's report, and each of them, except No. 5, be overruled and that said exception No. 5 as to two thousand one hundred and seventy barrels of the salt therein mentioned be sustained. And that this cause, as to the plaintiffs and the said firm of Humphrey, Tutt & Terry and the other defendants as to whom the plaintiffs' bill is not herein dismissed, be remanded to the said circuit court of the county of Kanawha with instructions to said court to refer the cause as between Ruffner, Donnally & Co., and the defendants Humphrey, Tutt & Terry to a commissioner to ascertain, settle, state and report the accounts between Ruffner, Donnally & Co., and the defendants Humphrey Tutt & Terry upon, and according to the principles and matters settled and ascertained in this opinion, so far as relates to them, and otherwise as may

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be, or is just and in accordance with the rules and principles of courts of equity, and that said circuit court further proceed in said cause, so far as the same remains undetermined, or any questions arising therein, according to the principles, rules and regulations of courts of equity in such cases.

DECREE REVERSED AND SUIT REMANDED.

## WHEELING.

## RUCKER v. SUPERVISORS.

July 15, 1874.

1. Section nine of article three, of the Constitution of 1863, of this State, providing that no salary or compensation of any public officer shall be increased or diminished, during his term of office, applies only to such salaries or compensation of public officers, as have been definitely fixed or prescribed by law; either by the Constitution of the State, or by some statute made in pursuance thereof. 1874.  
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2. It was competent for the Board of Supervisors to fix the annual amount, which the prosecuting attorney of a county should be allowed, under section sixty-six of chapter thirty-nine of the Code, or to reduce his allowance, after his term of office commenced, without, thereby, violating the foregoing article of the Constitution, or said sixty-sixth section of chapter thirty-nine of the Code.\*

\*The following is section nine of article three, of the Constitution of West Virginia, of 1863; and, also, section sixty-six of chapter thirty-nine, of the Code of West Virginia, referred to in the opinion of the Court:

"9. No extra compensation shall be granted or allowed to any public officer, agent or contractor, after the services shall have been rendered, or the contract entered into. Nor shall the salary or compensation of any public officer be increased or diminished during his term of office."

"66. The supervisors of every county shall allow annually to the county officers hereinafter mentioned, for their public services for which no other fee or reward is allowed by law, such sums, to be paid quarterly out of the county treasury, as are deemed reasonable by the board, within the limits ascertained by law, that is to say: to the sheriff, not less than fifty nor more than two hundred dollars; clerk of the circuit court not less than fifty nor more than two hundred dollars; recorder not less than twenty-five nor more than one hundred dollars; jailors, not less than thirty nor more than sixty dollars; and prosecuting attorney, not less than one hundred nor more than six hundred dollars, except that the prosecuting attorney of Ohio county shall be allowed annually not less than six hundred nor more than twelve hundred dollars. But no extra compensation shall be allowed to any public officer after his services shall have been rendered; nor shall the salary or compensation of any public officer be increased or diminished during his term of office."



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Appeal, by the plaintiff below, from a judgment of the circuit court of Pocahontas county, rendered on the 12th day of March, 1872, in a certain proceeding therein pending, wherein William P. Rucker was plaintiff, and the Board of Supervisors, of said county, were defendants.

The material facts appear in the opinion of Paull, Judge.

The Hon. Joseph M. McWhorter, judge of said circuit court, presided at the trial below.

*James W. Davis*, for the appellant.

*George H. Moffett*, for the appellees.

PAULL, JUDGE:

The plaintiff, William P. Rucker, was, in the month of October, 1870, elected Prosecuting Attorney for the County of Pocahontas, for the term of two years, said term commencing the 1st day of January, 1871, under the then Constitution and laws of the State. He regularly qualified and entered upon the duties of his office within, and at the time, prescribed by law, and attended upon the circuit court of said county, at the March term, 1871, and discharged the duties of said office. At a meeting of the Board of Supervisors in December, 1866, it was ordered, that there be allowed to the Prosecuting Attorney of said county, the sum of \$300 per annum, and, under this order, the Prosecuting Attorney drew his salary allowance until the 1st of January, 1871. More than four months after the term of office of the plaintiff commenced, it was ordered, by the Board of Supervisors, that he should receive \$150 per annum for his services as Prosecuting Attorney.

The Constitution of 1863, section nine, article three, provides that no salary or compensation of any public officer shall be increased or diminished during his term of office. The sixty-sixth section of chapter thirty-nine of the Code contains the same provision, and also pro-

vides that the supervisors of every county shall allow annually, to prosecuting attorneys, not less than one nor more than six hundred dollars.

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The order of the Supervisors reducing the allowance, or at least fixing the allowance, of the Prosecuting Attorney in the present case, having been made after his term of office commenced, and making the amount less than it had been during the previous term, the question presented is, have the Constitution and Code of the State been violated by this last order of the Board?

It will be observed that the Prosecuting Attorney receives no fixed salary prescribed by law, but his compensation consists of such fees as are allowed to be taxed for his benefit, under different provisions of the Code, as in section sixteen of chapter one hundred and twenty-eight, and such further allowances, as are authorized to be made to him by the board of supervisors under the aforesaid section sixty-six of chapter thirty-nine, being not less than one nor more than six hundred dollars.

This Court is of opinion that section nine, article three, of the Constitution applies only to such salaries or compensation of public officers as have been definitely fixed or prescribed by law; either by the Constitution of the State or by statute made in pursuance thereof. This is not the case in regard to the compensation of the prosecuting attorney for a county, who is paid for his services in the manner hereinbefore indicated, and by no fixed salary prescribed by law. Consequently; section nine, article three of the Constitution, and the provision in section sixty-six of chapter thirty-nine of the Code do not apply to the allowance or compensation which the law authorizes to be made to him by the board of supervisors, and which is of uncertain amount. The Constitution and Code have not been violated by the order of the Supervisors fixing the annual allowance of the Prosecut-

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ing Attorney, the plaintiff, in the present case, after his term of office commenced. The judgment of the circuit court of Pocahontas county, dismissing this cause, is affirmed, with costs to the appellees

Haymond, President, and Moore, Judge, concurred.

Absent, Hoffman, Judge.

**JUDGMENT AFFIRMED.**

## WHEELING.

CAMPBELL v. LYNN &amp; Co.

July 15, 1874.

On the trial of an issue under the plea of *non assumpsit*, C., the plaintiff, introduces evidence tending to prove that a contract was made by the defendant L. to pay him \$1,000 *per annum* for wages, and that said contract was agreed to be kept secret, that others in the employment of defendant might not be incited to demand an advance in their wages; that plaintiff continued under said contract for about three years, and had received \$2,840; that defendant introduced evidence tending to prove that no such contract was made, but that plaintiff was to receive \$15. per week during said three years, and that that amount per week was paid him during that time, and that a few days before said three years expired, plaintiff made a claim for \$1,000 per year as being their contract but which was denied by the defendant, and nothing further said at that time; that it was further proved that no other claim was made by plaintiff until about six months afterwards, when suit was brought, and, thereupon, the defendant offered to give evidence to the jury as follows, to-wit: "that the plaintiff was, during said three years and ever since, has been in very poor and very needy circumstances, pecuniarily."—HELD:

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1. That the evidence is inadmissible.
2. That a new trial will not be granted where a case has been fairly submitted to the jury and a verdict fairly rendered, unless manifest wrong and injustice have been done, or unless the verdict is plainly not warranted by the facts proved.

Appeal, by the defendants, from the judgment of the municipal court of the city of Wheeling, rendered on the 8th day of July, 1873, in a suit therein pending, wherein James Campbell was plaintiff and David Lynn, S. S. Lynn and John G. Lynn, partners in trade under the firm name of D. Lynn & Co., were defendants.

But two questions were discussed and considered by

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this court, and these arose upon the exclusion of certain evidence, by the court below, from the jury, on the trial, and the overruling of the motion of the defendants to set aside the verdict of the jury and grant them a new trial.

As shown by the *first* bill of exceptions, taken by defendants below, and which raises the *first* question discussed here "the plaintiff to maintain the issue on his part, introduced evidence tending to prove that a contract was made by the defendants immediately before January 1, 1869, to pay him \$1,000 per year, and to pay, also, his house rent, amounting to \$120 per year, for his services after that date as foreman of their iron foundry, and that said contract was agreed to be kept secret, so that the other employes of the defendants might not be incited thereby to demand an advance in their wages, and tending also to prove that plaintiff had served defendants under such contract until January 1, 1872, for which they had paid him before this suit was brought \$2,340, and had paid also therefor his house rent during said three years; and the defendants, to maintain the said issue on their part, introduced evidence tending to prove that no such contract was ever made, but that the plaintiff was to serve the defendants, as aforesaid, for \$15 per week and his house rent, as above, during said three years; and it was proved that said house rent, for said three years, was paid by the defendants before this case was begun, and that the plaintiff was paid by them, also before this suit was begun, \$15 per week for his services as such foreman at the end of each week, from January 1, 1869, to January 1, 1872, which amount was received by him during said three years without any claim that any more was due him for his services as aforesaid, except that a few days before January 1, 1872, plaintiff claimed to David Lynn, one of the defendants, that his understanding was that defendants were to pay him \$1,000 per year and to pay his house rent, and that said Lynn denied, in reply to said claim, that there was ever any such understanding, and nothing more was said by

either Lynn or Campbell at that time; and it was further proved that no other claim was ever made by plaintiff upon defendants for anything more than said \$2,340 and the house rent, until over six months after January 1, 1872, about the time this action was brought, and that plaintiff left the defendants' employment on December 31, 1871. And thereupon the defendants, to further maintain the issue on their part, offered to give evidence to the jury as follows, to-wit: That the said Campbell was, during said three years, and ever since has been, in very poor and very needy circumstances, pecuniarily.

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Whereupon the court, upon motion of the counsel for the plaintiff, excluded said evidence, so offered, from going to the jury, as inadmissible in law. To which ruling of the court, excluding the same, the defendants excepted, and tendered this their bill of exceptions, and prayed that the same might be signed, sealed and made a part of the record in this case, which is here accordingly done, this 9th day of July, A. D. 1873."

The *second* question discussed is raised by the *second* bill of exceptions, which recites "that after the jury were sworn to try the issue joined in this cause, the following facts were proven: That David Lynn, one of the defendants, on being asked by Matthew Beazle, a witness, in the iron foundry of the defendants in Wheeling, West Va., in the fall of 1869, what wages defendants were paying plaintiff as their foreman in said foundry. replied one thousand dollars per year and house rent, which house rent was afterwards proved to have been \$120 per year, though the amount or rate thereof was not stated by said David Lynn to said Beazle; that said Campbell was employed by D. Lynn & Co., from January 1, 1869, until January 1, 1872, as such foreman, and was paid by defendants, before the commencement of this action, fifteen dollars per week for each week during said time, and at the end of each week during said time received said wages for the week past; that his house rent, \$120 per year, for said three years, was also paid by defendants

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before the commencement of this action; that at the time said Beazle made inquiry, as above, of David Lynn, Beazle informed him he was about to go into the employ of Bell & Co., a firm who owned and operated another iron foundry in Wheeling, West Va. It was proved by the defendant David Lynn that he did not recollect of making any such statement, as above, to Beazle, but defendant stated that whatever statement he made to Beazle was the truth; that a few days prior to January 1, 1872, the plaintiff, in the engine room of said iron foundry of defendants, told David Lynn that his understanding was that defendants were to pay him one thousand dollars per year and his house rent as aforesaid; that David Lynn denied that defendants had ever agreed to do so, and no more was said on the subject at that time; that claimant was paid at the close of the year 1871, by defendants, fifteen dollars for his services, as aforesaid, during the last week of 1871, and received the same without claiming more was due him; that plaintiff left the service of the defendants as foreman on January 1, 1872; that the plaintiff told John Reed, a witness, a few days after January 1, 1872, that he had settled with defendants and left their employ; that plaintiff, while in the service of defendants, as aforesaid, as foreman, had sold out of the defendants' foundry the merchandise specified in the defendants' bill of set-offs, which is here referred to and made a part hereof; that said merchandise was thus sold at the dates and for the prices therein stated, and that the plaintiff had never, before the trial of this case, informed defendants he had made any such sales, nor accounted with them for or paid them the value of said merchandise, or any of it. And these were all the facts proved during the trial of said cause.

And thereupon the said jury being sent out of court to consult of their verdict, after some time returned and rendered a verdict for the plaintiff, assessing his damages at seven hundred and eleven dollars and one cent.

aggregate of principal and interest to the date of said verdict, and interest thereon from that date till payment, and costs: whereupon the defendants, by their attorneys, moved the court to set aside the said verdict and grant them a new trial therein, upon the ground that the said verdict is contrary to the evidence, which motion was overruled, and the defendants excepted to said ruling of the court, and tender this their bill of exceptions, which they pray may be signed, sealed, and made a part of the record in this case which here accordingly done, this 9th day of July, A. D., 1873."

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The Hon. Gibson L. Cranmer, judge of said municipal court, presided at the trial below.

*Caldwell & Caldwell*, for the appellants.

*J. Hanson Good* and *James P. Rogers*, for the appellee.

PAULL, JUDGE:

The plaintiff, James Campbell, brought his action of assumpsit in the court below, for services rendered the defendants for three years, amounting to \$3,360, only claiming an actual balance, however, to be due him of \$660. The declaration consists only of the common counts. Upon the trial, verdict and judgment were rendered for him, for the balance claimed and interest.

The plaintiff gave evidence as stated in the first bill of exceptions, tending to prove that a contract was made by the defendants immediately before January 1, 1869, to pay him \$1,000 per year, and to pay also his house rent amounting to \$120 per year, for services as foreman in their iron foundry; that said contract was to be kept secret, and that he had received thereon the sum of \$2,340 and his house rent during said three years.

And the defendants gave evidence tending to prove that no such contract was ever made, but that the plaintiff was to serve the defendants as aforesaid for \$15 per week and his house rent, for three years; that \$15 per week and his house rent was paid during the said three years without any claim that any more was due him, un-



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til a few days before January 1, 1872, when plaintiff claimed to D. Lynn, one of the defendants, that they were to pay him \$1,000 per year and house rent, and that said Lynn denied, at that time, that there was any such understanding; and that no other claim was made by plaintiff until six months afterwards when suit was brought.

And, thereupon, the defendants offered to give evidence to the jury, "that the plaintiff was, during said three years, and ever since has been in very poor and very needy circumstances, pecuniarily," but the court excluded the evidence, and defendants excepted. It will not be contended that this evidence was admissible with a view of impeaching the credibility of the plaintiff as a witness: Though it does not certainly appear from the bill of exceptions that he was introduced as a witness. Is the evidence pertinent to the inquiry, whether there was anything due to the plaintiff, being a question involved in the issue? The answer to this inquiry may not be wholly free from doubt; but we do not think, under the evidence as contained in the bill of exceptions, a sufficient foundation has been laid for introducing the evidence proposed. As he never claimed, for nearly three years, that more was due him than he had been receiving, the inference it is claimed, would be, that his necessities would have compelled him to make the claim earlier, if it had been founded in right. But the record shows that this contract, as to the amount, was to be kept secret, and it does not appear that all the evidence introduced is contained in the bill of exceptions. Although in needy circumstances, the inference proposed to be drawn from the evidence to be introduced may not be the correct one, to-wit: That nothing was due him, or that full payment had been made to him. He may have had other and what he regarded as sufficient reasons for his silence up to the time of making his demand. Upon the whole we think the evidence was not admissible and that there was no error in excluding it from the jury.

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Was there error in overruling defendants' motion for a new trial, is the only remaining question? The motion is made on the ground that the verdict is contrary to the evidence. The second bill of exceptions, setting forth the motion for a new trial contains a statement of the facts and evidence. It is unnecessary to give a particular analysis of the testimony, but merely observe that the contract for the payment of \$1,000 per annum to plaintiff and the house rent is clearly proved by the admission of one of the defendants, which he made by his own declaration to a witness, and which admission he does not deny, although himself examined in the case. It appears, however, that when the plaintiff subsequently claimed a larger amount than \$15 per week, under a contract for \$1,000 per annum, the defendant Lynn denied that such agreement was made. It is further shown that the plaintiff had said that he had settled with the defendants and left their employment. Upon a careful examination of this testimony and the evidence as it is presented in the record, we are unable to say that the judgment of the court, under the rules applicable to such motions, is erroneous. The rules of law governing applications for new trials have been clearly settled by repeated adjudications.

In the case of *Patteson v. Ford*, 2 Gratt., 18, it was held that the jury is the proper judge of the credibility of a witness. Consequently, when a motion for a new trial, based upon the ground that the verdict is contrary to the evidence, has been overruled by the court below, the appellate court will not reverse the judgment upon a certificate of the evidence. Contradictory or conflicting evidence, it has been alleged by the defendants in their petition, was given by the parties themselves, it would seem as witnesses, involving their credibility before the jury; and in such cases, according to the foregoing authority, an appellate court will not interfere.

In *Grayson's case*, 6 Gratt., 712, the principles applicable to new trials are again passed in review. And in

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the case of *Blosser v. Harshbarger*, 21 Gratt., 214, it was held as follows, in accordance with previous cases: "A new trial asked on the ground that the verdict is contrary to the evidence, ought to be granted only in a case of plain deviation from right and justice; not in a doubtful case, merely because the court, if on the jury, would have given a different verdict." Again, "When a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be interfered with by the court, unless manifest wrong and injustice has been done, or unless the verdict is plainly not warranted by the facts proved."

And again, "Where some evidence has been given which tends to prove the fact in issue; or the evidence consists of circumstances and presumptions, a new trial will not be granted, merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases, the evidence should be plainly insufficient to warrant the finding of the jury. And this restriction applies *a fortiori* to an appellate court." In the light of these decisions, and applying these principles to the evidence in the case before us, we do not think there was error in the judgment of the court below overruling the motion for a new trial, and the same is, therefore, affirmed, with costs and damages according to law to the appellee, and this opinion directed to be certified to the municipal court of Wheeling.

Haymond, President, and Moore, Judge, concurred.

Absent, Hoffman, Judge.

JUDGMENT AFFIRMED AND SUIT REMANDED.

## WHEELING.

DICKINSON, EXOR., v. LEWIS.

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| 48  | 409 |
| 7   | 673 |
| 149 | 230 |

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When a party obtains an appeal and *supersedeas* to decrees of a circuit court, rendered upon bill taken for confessed as to him, before applying to the court in which the decree was rendered, or the judge thereof in vacation, to reverse or amend the errors of which he complains, his appeal and *supersedeas* will be dismissed as improvidently allowed.\*

\* The following are sections five and six of chapter one hundred and thirty-four of the Code referred to in the opinion of the Court:

"5. The court in which there is a judgment by default, or decree on a bill taken for confessed, or the judge of said court in the vacation thereof, may, on motion, reverse such judgment or decree, for any error for which an appellate court might reverse, if the following section was not enacted, and give such judgment or decree as ought to be given. And the court in which is rendered a judgment or decree, in a cause wherein there is in a declaration or pleading, or in the record of the judgment or decree, any mistake, miscalculation, or misrecital of any name, sum, quantity, or time, when the same is right in any part of the record or proceedings, or when there is any verdict, report of a commissioner, bond, or other writing whereby such judgment or decree may be safely amended; or in which a judgment is rendered on a forthcoming bond for a sum larger than by the execution or warrant of distress appears to be proper, or on a verdict in an action for more damages than are mentioned in the declaration; or in the vacation of the court in which any such judgment or decree is rendered, the judge thereof may, on the motion of any party, amend such judgment or decree according to the truth and justice of the case; or in any such case the party obtaining such judgment or decree may, in the same court, at any future term, by an entry of record, or in the vacation, by a writing signed by him, attested by the clerk, and filed among the papers of the cause, release a part of the amount of his judgment or decree; and such release shall have the effect of an amendment, and make the judgment or decree operate only for what is not released. Every motion under this chapter shall be after reasonable notice to the opposite party, his agent, or attorney in fact or at law, and shall be within five years from the date of the judgment or decree,

"6. No appeal, writ of error, or *supersedeas* shall be allowed or entertained by an appellate court or judge for any matter for which

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Lewis.

This is an appeal, operating as a *supersedeas*, granted by one of the judges of this Court, upon the petition of John D. Lewis, from two several decrees of the circuit court of Kanawha county, rendered on the 16th day of December, 1868 and 7th day of July, 1870. The complainant below was "William Dickinson, as executor of William Dickinson, deceased, who was the surviving partner of William Dickinson, deceased, and Joel Shrewsbury, deceased, late partners in trade, by the name and style of Dickinson & Shrewsbury;" and the respondents, said John D. Lewis and William D. Shrewsbury, and a large number of persons, who, either individually or in some other capacity, were secured in certain deeds of trust, executed by the said Lewis and William D. Shrewsbury, as partners under the firm name of Lewis & Shrewsbury, on the 3d day of January, 1843; by the said John D. Lewis, on said 3d day of January, 1843, the 20th day of October, 1868, and on the 22d day of November, 1855. It is not deemed necessary to set forth the names of all the respondents; and, in the view which this Court took, it is not necessary to further state the facts as they appear in the record.

The Hon. James W. Hoge, judge of said circuit court, presided at the hearing below.

*William H. Hogeman*, for the appellant.

*Smith & Knight*, for the appellees.

HAYMOND, PRESIDENT:

In this case the plaintiff William Dickinson filed a bill and supplemental bill against defendant John D.

a judgment or decree is liable to be reversed or amended, on motion as aforesaid, by the court which rendered it, or the judge thereof, until such motion be made and overruled in whole or in part. And when an appellate court hears a case wherein an appeal, writ of error, or *supersedeas* has been allowed, if it appear that either before or since the same was allowed, the judgment or decree has been so amended, the appellate court shall affirm the judgment or decree, unless there be other error; and if it appear that the amendment ought to be and has not been made, the appellate court may make such amendment, and affirm in like manner the judgment or decree, unless there be other error."

Lewis, and a number of other persons, trust creditors of said Lewis, defendant. John D. Lewis is a resident defendant and is proceeded against as such—Some of the other defendants are residents of the State and proceeded against as such, and some of the defendants are non-residents of the State and are proceeded against as such.

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The first decree in the cause was made by the circuit court of Kanawha county, on the 13th day of October, 1866, at which time the cause was heard upon the complainants bill and supplemental bill and exhibits and taken as for confessed as to the defendant John D. Lewis (the appellant) and other defendants, in the decree named, upon whom process had been served, personally, and upon publication as to the non-resident defendants. The decree, then made in the cause, is a decree of reference to a commissioner to ascertain and report the nature and amount of plaintiff's claim, the real estate of said Lewis, the liens thereon, the amount and priorities thereof, &c.

The next decree made in the cause by the circuit court was on the 16th day of September, 1868, when it appears the cause was heard on the bills and exhibits, the former decree made in the cause, and upon the report of the commissioner made to the court, asking for certain instructions and stating the matters required by said decree; and the cause was then referred to William H. Hogeman, in lieu of the former commissioner, who was relieved at his own request, to ascertain and report certain matters stated in the decree and giving certain directions stated in the decree then made.

The next decree in the cause was made on the 7th day of July, 1870, by which it appears that the cause was heard on the bills, and all the papers theretofore read and the report and supplemental report of special commissioner Hogeman. And there being no exceptions to the reports, the court, by its decree, confirmed the report of special commissioner Hogeman, as amended and corrected by his supplemental report, and decreed the sale of lands of defendant Lewis to pay certain debts of said

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Lewis, and appointed special commissioners for that purpose with directions to them to make the sale upon the terms in the decree stated, and to report their proceedings to the court.

From these orders and decrees an appeal has been allowed the said Lewis to this Court, upon his petition and assignment of errors,—no other orders and decrees having been made in the cause.

Defendant Lewis, though personally served with process in the cause, never appeared thereto or filed any answer therein, and no exceptions were filed to the reports of the commissioner by Lewis or any other person.

The fifth section of chapter one hundred and thirty-four of the Code of this State, provides that the court in which there is a judgment or decree on a bill taken for confessed, or the judge of said court in the vacation thereof, may on motion, reverse such judgment or decree for any error for which an appellate court might reverse it, if the following section was not enacted, and give such judgment as ought to be given.

And the sixth section of the same chapter of the Code, provides that no appeal, writ of error or *supersedeas*, shall be allowed or entertained by an appellate court, or judge, for any matter for which a judgment or decree is liable to be reversed or amended, on motion as aforesaid, by the court which rendered it, or the judge thereof, until such motion be made and overruled, in whole or in part,

All the decrees in this cause were clearly made on bill taken for confessed, as to said Lewis, and it does not appear by the record, that he, or any other person, has made the motion to reverse said decrees, or any part of them, required by the said fifth and sixth sections. Under this condition of the case it is clear that this Court has not now any jurisdiction or authority to entertain the appeal allowed the said Lewis, in this case, and the appeal was improvidently allowed.—See *Davis, Sheriff v. The Commonwealth*, 16 Gratt., 136, and 21 Gratt., 107, as to judgments by default.

For these reasons, the appeal and *supersedeas*, allowed in this cause, must be dismissed, as being improvidently allowed, and the appellees recover against the appellant their costs in this Court expended.

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Paull and Moore, Judges, concurred.

Absent, Hoffman, Judge.

APPEAL DISMISSED AS IMPROVIDENTLY ALLOWED.



## WHEELING.

## BROWN v. KNAPP.

July 15, 1874.

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- 1, Allegations in a bill, denied in an answer—the bill and answer being both under oath—appearing to be established by satisfactory proofs in accordance with section fifty-nine of chapter one hundred and twenty-five of the Code; it is error to dismiss the bill.
2. It appearing in the progress of a cause, that a person having such an interest in the subject matter of the suit as to make him a necessary party to the cause, is not before the court, it is error to decree in his favor, without his being first made a party, and ascertaining his rights.

Appeal by the complainant below, Tinsley Brown, from two several decrees rendered by the circuit court of Greenbrier county, one on the 15th day of December, 1871, and the other on the 12th day of April, 1872, in a suit in chancery against Gamaliel Knapp, N. W. Noell and Phares B. Harrah respondents.

The facts and statutes alluded to sufficiently appear in the opinion of the Court.

The Hon. Joseph M. McWhorter, judge of said circuit court presided at the hearing below.

*James W. Davis*, for the appellant.

*Samuel Price*, for the appellees.

PAULL, JUDGE:

The plaintiff in this case claims under the alleged assignment of a bond made to him by the payee therein, and the payee and maker of said bond are made parties. The bill alleges that after said assignment and delivery of the bond to the plaintiff, the same was returned to

the payee or assignor, that he might take measures to secure the collection of the same, and that said assignment was made for value.

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The assignor Knapp, filed his answer, expressly denying the assignment of said bond, and its delivery to the plaintiff as his absolute property, and that the same was subsequently returned to him by the plaintiff and was assigned by said Knapp for value to one Phares B. Harrah.

The plaintiff then filed an amended bill, making said Harrah a party, and charging that the assignment to him was fraudulent, and praying that he might be required to deliver up said bond to the plaintiff.

Harrah filed his answer, denying the allegations of the bill, and alleging that there was no assignment on the bond, when the same came into his possession, which was some years after the alleged assignment to the plaintiff; that the same was assigned to him for value, and by him assigned for value to another party.

The bill and answers were sworn to by the parties.

Under the case, as thus presented, the plaintiff is required to establish his title to the bond by sufficient evidence. The assignment of the bond is denied, and any ownership therein on the part of the plaintiff, and these facts must now be made to appear by satisfactory proofs. The fifty-ninth section of chapter one hundred and twenty-five provides, "when a defendant in equity shall in his answer deny any material allegation of the bill, the effect of such denial shall only be to put the plaintiff on satisfactory proof of the truth of such allegation, and any evidence which satisfies the court or jury of the truth thereof, shall be sufficient to establish the same." No evidence whatever is taken by the defendants to establish the allegations in their answers, and the case rests simply on their denials and the depositions taken by the plaintiff in support of his bill. The plaintiff himself proves that the bond was assigned to him by the defendant Knapp for value in 1861, to-wit: in part payment

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for the price of a horse ; that the same was assigned to him in writing, and had been returned to defendant Knapp, that he might take steps to secure its collection ; and moreover, that the maker of said bond, the defendant Noell had said to him, since the bringing of this suit, that said bond was not paid.

The defendant Noell, himself testifies that he saw the bond in the possession of plaintiff, Brown, and, to the best of his recollection, there was an assignment on said bond. Said Noell further testifies, that defendants Knapp and Harrah, both came to him, after he was notified by the plaintiff not to pay the said bond, and wished him to execute a new bond. Samuel Pucket testifies that, in 1862, defendant Knapp came to the house of the plaintiff, who told him that he was in need of money, and Knapp said to him, if he would give him the note he would try and collect it for him, and the note was given to him ; he also proves defendant Noell's declaration to Brown, made in 1861, that he would pay the same in a short time. In the absence of all evidence to the contrary, or of any evidence whatever in support of the answers, we think the assignment to the plaintiff is sufficiently established, as also notice of this assignment to the maker thereof, to-wit : defendant Noell, by the depositions found in the record.

As before stated, there is no evidence on the part of the defendants, and they claim no affirmative relief. The defendant Noel proves his knowledge of the assignment of the bond in 1861 ; that he had notice thereof at that time, and that said bond was not paid until after this suit was brought.

With this statement of the case and the evidence, we think the decree of the circuit court, made on the 15th day of December, 1871, dismissing the plaintiff's bill, is erroneous.

It seems, however, from a decree entered in this cause on the 12th day of April, 1872, that there is a judgment

on the law side of the circuit court of Greenbrier county, in favor of O. C. Martin, assignee, &c., v. N. W. Noell, and that by consent of parties the money to satisfy the same should be paid by the sheriff to J. W. Davis, to be held subject to the order of the court in this suit; and the plaintiff's bill having been dismissed, it was adjudged and ordered, that said judgment be absolute, and said O. C. Martin be permitted to receive the money collected on the same directly to his own use and benefit. We have seen that it was error to dismiss the bill, and it was, consequently, error to make the foregoing order, without first making the said O. C. Martin a party in this cause, he now appearing to be a person directly interested in the subject matter of this controversy.

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The decree of the circuit court, made on the 15th day of December, 1871, and the decree of said court made on the 12th day of April, 1872, are reversed and annulled, with costs to the appellant against the appellees, P. B. Harrah, and N. W. Noell, and this cause is remanded to the circuit court of Greenbrier county, with leave to the plaintiff to amend his bill, and make additional parties, and for further proceedings touching the rights of said parties.

Haymond, President, and Moore, Judge, concurred.

Hoffman, Judge, did not sit in the hearing and decision of this suit.

DECREES REVERSED AND SUIT REMANDED.

## WHEELING.

## TAPPAN v. PEASE.

July 15, 1874.

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To entitle a person, who claims to have a mortgage lien on land attached by a creditor, in a suit in equity in which an attachment is sued out against a non-resident debtor, under the twenty-fourth section of chapter one hundred and six of the Code of West Virginia, to dispute the validity of the attachment, such person must appear in the court in which the proceeding is had and file his petition and give security for costs; and so as to contesting the priority of the attaching creditor's lien over the mortgage lien.\*

Appeal, operating as a supersedeas, granted by the Hon. Ralph L. Berkshire one of the judges of the late Supreme Court of Appeals of this State, upon the petition of Claudius B. Pease, from an order and decree of the circuit court of Kanawha county, made and entered on the 2d day of April. 1872, in a suit therein pending, wherein Eli T. Tappan, was complainant and Giles Pease, respondent.

The interest of the petitioner in this suit, together with such of the material facts necessary to understand the

\* Section twenty-four of chapter one hundred and six of the Code of this State, referred to in the opinion of the Court, is as follows:

Any person interested may file his petition, at any time before the property attached as the estate of a defendant is sold under the decree or judgment, or if the proceeds of the sale have not been paid over to the plaintiff, or his assigns, within one year after such sale, disputing the validity of the plaintiff's attachment thereon, or stating a claim thereto, or an interest in or lien on the same, under any other attachment or otherwise, and in its nature, and upon giving security for costs, the court, without any other pleading, shall impanel a jury to inquire into such claim, and if it be found that the petitioner has title to, or lien on, or any interest in, such property or its proceeds, the court shall make such order as is necessary to protect his rights; the costs of which inquiry shall be paid by either party at the direction of the court.

decision of this Court, will be found stated in the opinion of Haymond, President.

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The Hon. Charles W. Smith, judge of the circuit court of Cabell county, presided at the hearing below.

*Smith & Knight*, for the appellant.

*Abram Burlew*, for the appellee.

HAYMOND, PRESIDENT:

The plaintiff commenced this suit, on the chancery side of the circuit court of Kanawha county, on the 26th day of July, 1870, and on the same day the clerk of the court, upon affidavit being filed, issued orders of attachment against the estate of the defendant, Giles Pease. On the 26th day of July, 1870, the order of attachment directed to the sheriff of Kanawha county was levied on four hundred and seventy acres of land, of said Giles Pease, situated partly in the county of Kanawha and partly in the county of Clay, as stated in the sheriff's return. The bill is filed to set up a lost bond made by Giles Pease to the plaintiff, for \$900; and to collect the same out of the estate of Giles Pease, in this State, he being proceeded against in the cause as a non-resident by order of attachment sued out in the cause, when the summons was issued.

It appears that the plaintiff was the owner of an undivided third of the four hundred and seventy acre tract of land on which the order of attachment was levied, and sold his interest in the land to Giles Pease for \$900—for which a bond was given by Giles Pease to plaintiff, which was payable in the future, and upon the happening of some events not necessary now to mention.

Plaintiff had his *lis pendens* docketed in the Recorder's office of Kanawha county on the 26th of July, 1870. Order of publication was made and executed in the cause as to Giles Pease and on the 24th day of November, 1871.

Giles Pease appeared to the cause, and filed his answer therein. This answer goes principally to the merits

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of the cause, and the sufficiency of the affidavit filed on which the order of attachment issued is in no wise questioned by the answer, or by Giles Pease, in any other manner.

A general replication was filed by the plaintiff to the answer.

On the 30th of March, 1872, Claudius B. Pease appeared in court and asked leave to file a petition in the cause in which he claimed a lien on the four hundred and seventy acres of land on which the order of attachment had been levied, by reason of a mortgage alleged to have been executed by Giles Pease to the petitioner, on the 20th day of March, 1871, to secure the payment of \$4,443, evidenced by the promissory note of said Giles Pease, of even date with the mortgage, payable to petitioner, one year after date bearing, eight per cent. interest. A copy of the mortgage is alleged to be filed with the petition. In the petition it is alleged that the attachment is invalid, null and void, because sued out upon an illegal and insufficient affidavit, and because the land lies wholly within the county of Clay, and the circuit court of Kanawha county has no jurisdiction of said suit. The plaintiff objected to the filing of the petition, but the court overruled the objection and permitted the petition to be filed.

The alleged mortgage which is filed appears to have been acknowledged by Giles Pease in the state of Massachusetts, the 31st day of March, 1871, but does not seem to have been admitted to record in the county of Kanawha or the county of Clay or in fact in any county within this State.

On the 2d day of April, 1872, the cause was heard upon said petition by the court, neither party requiring a jury, and the court decided that the petitioner had a mortgage lien upon the lands of Giles Pease, on which the plaintiff's attachment had been levied, for the sum of \$4,443, as of the 20th of March, 1871, with interest, &c.

And thereupon the petitioner moved the court to quash plaintiffs attachment issued and levied in the cause, without assigning any reasons, so far as the record discloses, and the court overruled the motion. The court also determined that the attachment is a prior and superior lien upon the lands of Giles Pease on which it was levied, to the mortgage aforesaid, and that the plaintiff was entitled to be satisfied out of the proceeds that may arise from the sale of the land.

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On the same day the cause came on to be heard upon the bill and exhibits filed therewith, the answer of Giles Pease, the replication thereto and upon the petition of Claudius B. Pease and the replication thereto, and upon certain affidavits therein named, and upon the sheriff's return upon the attachment issued on the 26th day of July, 1870, and directed to the sheriff of Kanawha, and upon the depositions taken by complainant and filed in the cause, and upon plaintiff's affidavit, and upon the *lis pendens* duly recorded in the county of Clay, on the 3d of August, 1870, and in the county of Kanawha on the 26th day of July, 1870, and the court determined and ascertained plaintiff's debt against Giles Pease to be \$1,273.50, with interest from the first day of April, 1872, until paid, and rendered a personal decree against said Giles Pease for said sum, with interest as aforesaid, and the costs of suit, and decreed that unless the same were paid within twenty days from the rising of the court, that the four hundred and seventy acres of land be sold, &c., and appointed a special commissioner for the purpose, &c.

From said orders and decrees made on the said 2nd day of April, 1872, the said petitioner Claudius B. Pease has obtained an appeal and *supersedeas*. Claudius B. Pease, in his petition for an appeal and *supersedeas* assigned four causes of error in the said decrees of the circuit court, the third and fourth of which his counsel, in his written argument, filed with this Court, at the hearing thereof, abandoned, so far as they apply to the merits



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of the cause, as stated in said argument, by consent. And the counsel for the appellant, (Claudius B. Pease,) relies before this Court on the *first* and *second* errors assigned in his said petition for an appeal and *supersedeas*. No other errors in the said decrees have been assigned or alleged before this Court, by the appellants, than the said first and second assigned in his said petition for an appeal &c., since the abandonment of the said third and fourth.

The *first* error assigned is that the court erred in overruling the appellant's (Claudius B. Pease,) motion to quash the attachment "because the affidavit upon which the attachment issued is defective. And, *second*, the court erred in deciding that plaintiff's attachment was a prior and superior lien, upon the said land, to said mortgage." As the same result must be arrived at, as to each of the assignments of error, they will both be considered together. The first question to be determined is, had the appellant before or at the time of making the motion to quash, placed himself in a position to authorize him to do so, or to call in question the priority of the plaintiff's attachment lien over his alleged mortgage lien. To do this it was necessary that he should have done two things required by the twenty-fourth section of chapter one hundred and six of the Code of this State, to-wit:

*First*, filed his petition stating his claims or lien on the property attached, and

*Second*, give security for costs before the court.

It appears that he did file his petition stating his claim and lien, but it does not appear that he gave security for costs. He had no right to make the motion to quash or take or require the court to take any step in the cause before giving security for costs, after his petition was filed. The petitioner, the appellant, not having given security for costs, according to law in such case, was not entitled to move to quash said attachment, and for this reason it was not error in the circuit court, of which the

appellant can complain, to overrule said motion. See the opinion of the Court delivered by Judge Maxwell in the case of *Ludington v. Hull*, 4 W. Va., 131, 132 and 133. The opinion in that case is predicated on the provisions of the twenty-fifth section of the code of Virginia, of 1860, and the twenty-fourth section of chapter one hundred and six of the Code of this State, under which the proceedings in the case at bar were had, and the provisions of said twenty-fourth section are identical, with the provisions of said twenty-fifth section. The decision in the *Ludington case*, was rendered in 1870, and there has been no change made in the law since that time, applicable to this case. In that case Judge Maxwell says: "This section provides the only means by which a person claiming an attachment lien, on property attached, can come into court to dispute the validity of a prior attachment. It must be by petition stating the nature of the claim to a lien on the property attached, and security for costs must be given." There is no difference in case of an attachment lien and any other lien attempted to be asserted.

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The same rule and principle applies to the appellant's *second* error assigned, as to the *first*, as must be obvious. Generally, to authorize this Court to reverse a decree of the court below, it must appear affirmatively, by the record, that the court erred to the prejudice of the party complaining of the action of the court. Neither the plaintiff or defendant in this cause complain here of the action of the circuit court, in overruling said motion, or in deciding that the plaintiff had an attachment lien, first in priority, upon the land for the payment of his debts. No one makes such complaint here but the appellant. Indeed, the defendant, (Giles Pease,) raised no question as to the sufficiency of the affidavit in the circuit court. It has been suggested, however, that this Court should presume that security was given in the court below. Appellate courts sometimes, under pe-

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culiar circumstances, will presume some things in support of judgments or decrees of inferior courts, when they are sought to be reversed. But it is apprehended that an appellate court, in a case where all the proceedings are of such recent date as in the case at bar, will seldom supply the record by presumptions in favor of an appellant, in order to furnish sufficient reasons to reverse a judgment or decree, which, according to the record, is right, so far as the appellant is concerned. Such cases may, perhaps, be presented; this, however, we do not now determine; but certainly, if there are such cases, this is not one. It does not appear by the record, for what reason the circuit court overruled the motion to quash, &c.; therefore, if this Court can see any sufficient reason, it is sufficient. If the affidavit be defective, the defect is not of such character as to authorize this Court to determine, in considering this appeal, under the circumstances, that it was the duty of the circuit court, *ex officio*, to quash the attachment.

For the reasons above stated, the order and decree of the circuit court of Kanawha county, rendered in this cause on the 2d day of April, 1872, must be affirmed with costs and \$30 damages against the appellant.

Paull and Moore, Judges, concurred.

Hoffman, Judge, absent, by reason of sickness.

ORDER AND DECREE AFFIRMED.

## WHEELING.

## LEWIS v. SPENCER.

July 15, 1874.

1. A court of equity has jurisdiction to enjoin a sheriff from making sale of personal property for the payment of taxes, on which he has levied, where the bill alleges that said taxes have been fully paid and discharged. 1874.  
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2. Upon proof that the taxes have been paid off and discharged, the injunction will be perpetuated.

Appeal, by the complainant below, from two decrees of the circuit court of Roane county, rendered on the 13th and 14th of November, 1872, dissolving an injunction and dismissing a bill, in a suit then pending in said circuit court, between Edward Lewis, complainant, and John W. Spencer and N. P. Lee, respondents.

The object of the suit was to restrain the respondent Spencer, who was at the time acting sheriff of said Roane county, and said Lee, his acting deputy, from making sale of a horse theretofore distrained and advertised for sale, to satisfy certain taxes for the year 1868, in the hands of said sheriff, or his said deputy, for collection, against the estate of James A. Lewis, who was the father of complainant. The bill alleged that the taxes, for which said distraint had been made, had been fully paid and discharged, to one Adelbert Noyes, an acting deputy of said sheriff, by the representatives of the estate of said James A. Lewis; and the proof fully sustained the allegation of payment. The testimony also proved that there was special authority, in this case, to receive payment of the taxes in controversy, in addition to the general authority inhering in said Noyes, as such deputy.

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Spencer answered admitting that Noyes was his deputy for the year 1868; alleging that Noyes was his deputy "for said county of Roane and no where else;" that the tax ticket against said estate was never delivered to said Noyes, but was retained by respondent in his own possession; that said Noyes happening to be in the county of Kanawha after said taxes were assessed, made out a tax ticket for the same, at the request of said personal representatives, and collected it; denied the authority of Noyes to make the collection, and charged that if paid, it was paid to a person wholly unauthorized to receive the same; and that the said personal representatives should have made inquiry as to the authority of said Noyes to go into Kanawha county and make such collection, "particularly as said Noyes then and there made out such ticket."

The respondents took no testimony. The complainant rested his case on the deposition of said Noyes, which sustained the material allegations in his bill, and which was unimpeached, and read upon the hearing—all objections thereto having been overruled.

The Hon. Robert S. Brown, judge of said circuit court, presided at the hearing below.

*William H. Hogeman*, for the appellant.

*Henry C. Flesher*, for the appellees.

PAULL, JUDGE:

The only question presented upon the record in this case is as to the jurisdiction of a court of equity to enjoin a sheriff from the sale of personal property, which he has distrained for the payment of taxes.

The bill alleges that the sheriff of Roane county claiming that certain taxes were due and unpaid, had levied upon a horse of the plaintiff for the payment of the same, and had advertised said horse for sale; that the taxes for which said levy was made had long since been paid off and discharged, and if said horse was disposed of under said advertisement and sale, great injury, loss and damage would accrue to the plaintiff.

The judicial history of Virginia, and of this State, fails, so far as we are aware, to present any case, wherein the question here presented, has been adjudicated.

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Various and different grounds have been assigned on which this jurisdiction is claimed to be based, and the decisions not altogether uniform. See 3 Munford 99 and 559, where it was *held* that a court of equity might enjoin a sale of personal property until the question of title was settled, and that a party claiming the property should not be left to an action at law for uncertain damages. This decision however was modified by the subsequent cases in 3 Rand. 25 and 170. Mr. Tucker, in his Commentaries, 2 vol., 481, expresses strong dissent from these latter cases.

In the later case of *Crawford v. Thurmond*, 3 Leigh, 85, the facts were these: before an execution had been delivered to the sheriff the debtor had made full satisfied, to the creditor, and taken his receipt in full for the debt; it was *held* that though the debtor might have made a motion to quash the execution, and thus have had a remedy at law, yet equity may give relief by way of injunction to inhibit further proceedings on the execution.

The case under consideration is perhaps not materially different in principle, if it is conceded that the tax payer has a remedy at law against the sheriff, as a trespasser, and obtains damages by way of compensation for the injury he has sustained, from what turns out to have been illegal conduct on the part of the officer. The latter is armed with the authority of law, with the tax bill in his hands, to distrain, at once, the property of the citizen. If, upon his alleging that the very taxes for which the levy has been made have been paid off and discharged, he is not permitted to come into equity to stay the hand of the officer, until the truth of the facts can be ascertained, it is manifest that he may be subjected to great hardships and inconvenience. The levy may have been made, for example, upon the engine or other machinery in his mill or other establishment, which are thereby stopped, and the

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owner required to await the result of an action for damages, after the sale and removal of the property have been effected. A debtor, against whom an execution has issued, but who claims that he is entitled to further credit, on the same, is debarred an entrance into a court of equity for the reason that he may apply to the court whence the execution issued, and have the wrong corrected. *Morrison v. Speer*, 10 Gratt. 228; but this case is distinguished from the case of *Crawford v. Thurmond*, 3 Leigh. 85, hereinbefore cited. In the case before us, the citizen has no such ready and effectual means of relief. In this connection the act of the Legislature found in section two of chapter one hundred and fifty-eight of the acts of 1871, may be referred to. It provides that no court shall have jurisdiction to enjoin the sale of any real estate delinquent for taxes, unless (among other things) it be averred in the bill that all taxes and levies which have been made and assessed thereon, have been fully paid. This would seem to imply that in regard to real estate, at least, that where this allegation is made such injunction may be awarded; and no sufficient reason is perceived why the same course may not be pursued in regard to personal property, where sale, as we have seen, may also result in great inconvenience to the citizen. Upon the whole we think the jurisdiction of the court, under the allegations of this bill, should be sustained. The evidence in this case satisfactorily shows that the taxes for which the levy was made, were paid off and discharged, previous to such levy.

We are therefore of opinion that the decree of the circuit court of Roane county, made in this cause, on the 13th day of November, 1872, is erroneous, and the same is hereby reversed with costs to the appellant; and this Court proceeding to render such decree as the circuit court should have rendered, doth adjudge, order and decree, that the order of injunction heretofore made in this cause, be made perpetual.

Haymond, President and Moore, Judge concurred.

Absent, Hoffman, Judge, by reason sickness.

**DECREE REVERSED AND INJUNCTION PERPETUATED.**

## WHEELING.

## RAILROAD COMPANY v. TYREE.

July 15, 1874.

Commissioners appointed by a circuit court, under the eleventh section of the forty-second chapter of the Code of West Virginia to ascertain the value of the land proposed to be taken by a railroad company for the purposes of its road and damages to the residue of the tract, &c., ascertain the actual value of the land at the time when taken, without reference to any enhanced value given thereto and common to other land owners along the line of the road by reason of the prospective construction of the railroad company's road through the land, such value, so ascertained, is a just compensation for the land, to the land owner, within the meaning of the Constitution.\*

1874.  
June Term.

|     |     |
|-----|-----|
| 7   | 693 |
| 39  | 200 |
| 7   | 693 |
| 657 | 424 |
| 7   | 693 |
| 60  | 447 |

Writ of error, granted by one of the Judges of this Court, upon the petition of the Chesapeake and Ohio

\* For section fourteen of chapter forty-two of the Code, referred to in the opinion of the Court, see *Railroad Company v. Halstead*, *infra* 201. The following is section eleven of the said chapter, referred to in the opinion of the Court:

"11. The appraisalment shall be made as follows: thirteen disinterested freeholders shall be nominated by the court, of whom the applicant may strike off four or less number from the list, and the defendants, or such of them as appear or are represented, may also strike off four or less number, and after eight names are stricken from the list, the remaining five shall be the commissioners. But where there is no appearance for the defence, or the defendants who appear or are represented do not agree as to any one or more of the names to be stricken off on their behalf, or the right to strike off any one or more names is waived on the part of either the applicant or defendant, or from any cause the full number shall not be stricken off by the parties, the names or additional names, as the case may be, to be stricken from the list in order to reduce the number to five, shall be ascertained by lot, under direction of the court. Vacancies shall be filled, and any commissioner for good cause shown may be removed by the court."



1874.  
June Term.  
Railroad Co.  
v.  
Tyree.

Railroad Company, to a judgment of the circuit court of Fayette county, to certain proceedings had therein under the forty-second chapter of the Code, to acquire so much land, owned by William Tyree, situate in said county, as should be necessary for the right of way, and for other purposes, under their charter, by the said Company.

The judgment was rendered on the 3rd day of September, 1873. The other facts appear in the opinion of the Court.

The Hon. Homer A. Holt, judge of said circuit court, presided at the trial below.

*William H. Hogeman*, for the appellant.

*Samuel Price*, for the appellee.

HAYMOND, PRESIDENT:

This is a proceeding of the plaintiff against the defendant to condemn a part of the defendant Tyree's land for the purposes and uses of plaintiff in constructing, maintaining and using its Railroad. The proceedings were had under the forty-second chapter of the Code of this State. It is agreed by the parties that the application by the plaintiff was duly and properly made according to the statute; that the notice was duly served on the defendant; that the commissioners were regularly appointed according to the provisions of section eleven of chapter forty-two of the Code; that the commissioners were duly sworn, and a certificate of their oath returned with their report, and that said Tyree was duly notified of the time and place of the meeting of the commissioners on the land proposed to be taken, and that he was present with them at the time of the valuation. The report of the commissioners is, on its face, in substance, as well as form, in accordance with the provisions of the fourteenth section of chapter forty-two of the Code and is signed by the five commissioners. The

defendant, on the report being returned to the circuit court of Fayette county, in which county the land is situate, filed three several exceptions thereto, of which it is only necessary to consider the *third*, which is as follows, viz:

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Railroad Co.  
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"Because the commissioners, in making their assessment of damages, adopted an erroneous principle which misled them. They assessed the then value of the land without reference to any enhanced value which the prospect of the road had imparted to that land, in common with all the other lands adjoining and contiguous to the line of the Road." The case was on the 3rd day of September, 1873, heard by the court on the report, and the exceptions filed thereto, and the facts as agreed by the parties. Among the facts agreed are those numbered *seventh*, *eighth* and *ninth*, and they are as follows:

"*Seventh*. That the commissioners, in ascertaining a just compensation to the defendant, for the land and damages mentioned in their report, valued said land without reference to any enhancement of its exchangeable value existing, on the day of the valuation, by the commissioners, and given to it by the contemplated building of said Railroad, but estimated it at its actual value at the time without reference to any enhanced value given to said land by reason of the prospective construction of the applicant's Railroad through said land."

"*Eighth*. That if said commissioners had estimated said land according to the enhanced value at the time, based on the prospective building of plaintiff's Railroad, through said land, which enhanced value was common to other lands along the said road, the assessment would have been considerably larger."

"*Ninth*. That the said Railroad was not built at the time of said assessment along the line, and at that point, but was in process of construction along the line and at that point."

The court, on the facts agreed, aforesaid, sustained said third exception to the report, and gave no opinion

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as to the other two exceptions, and adjudged and ordered, that the report be set aside and recommitted to the same commissioners for a further report to be made according to law. To which opinion and decision of the court the plaintiff excepted. To this opinion and decision, on the application of plaintiff, a *supersedeas* has been allowed, and the question to be determined is whether the circuit court erred in its said decision.

The fourteenth section of the forty-second chapter of the Code provides that as to each tract, the commissioners after viewing the same and hearing any proper evidence which is offered shall ascertain what will be a just compensation to the person entitled thereto, for so much thereof as is proposed to be taken, and for damage to the residue of the tract, beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed, for the purpose to which the land to be taken is to be appropriated and make report, &c. This section of the Code so far as I have quoted from it is taken from the tenth section of the fifty-sixth chapter of the code of Virginia of 1860, which was in force in this State so far as relates to this subject, as now recollected, up to the time the Code of this State took effect, and it is intended to be in accordance with the principles decided by the Court of Appeals of Virginia in 1838, in the case of the *James River and Kanawha Company v. Turner*, 9 Leigh. 313, so far as the principles there decided apply thereto. Although that decision was made by less than a full court, and by a majority of those present, its correctness has since been recognized by the same court. See *Muire v. Falconer* 10 Gratt., 17 and 18. The general legislation in Virginia and this State upon the subject has, so far as I am advised, conformed to the principles held in the case cited in 9 Leigh. The charter of the J. R. and K. Company provided, that the assessors for ascertaining damages to proprietors of lands required for the Company's canal and improvement, should take into consideration the quantity and quality of the land to be

condemned, the additional fencing that will be required thereby, and all other inconveniences that will result to the proprietor from the condemnation thereof, "and shall combine therewith a just regard to the advantages which the owner of the land will derive from the improvement, for the use of which his land is condemned." *Held* that the advantages to be derived to the owner of the land condemned for the Company's use, from the improvement to which the charter requires the assessors to have regard, are such advantages as particularly and exclusively affect the particular tract or parcel of land whereof a portion is condemned—not advantages of a general character which may be derived to the owner in common with the country at large from the improvement. And it seems that, if the charter had provided that advantages of a general character, which the owner of the land condemned may derive from the improvement in common with the country at large should be set-off against the actual value of the land condemned and the actual damages sustained by the owner, such a provision would have been unconstitutional." 9 Leigh., 313.

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The facts agreed in the case under consideration fairly construed certainly mean that the commissioners did assess or ascertain the actual value of the defendant's land at the time when taken, without reference to any enhanced value given to the land in common with other land owners along the line of the road by reason of the prospective construction of the plaintiff's Railroad through the land. Said fourteenth section of the Code evidently means that the commissioners shall ascertain what will be a just compensation to the owner for so much thereof as is taken, at the time it is taken. The question here arises, what is a just compensation for the land taken in the sense and meaning of the law and constitution? If the owner of the land proposed to be taken gets its actual value at the time when taken by the railroad compa-

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ny, without reference to any enhanced value which may have attached thereto by reason of the prospect of the railroad being constructed in the future, does he not receive a just compensation therefor within the meaning of the law and the constitution? Is not the enhanced value which may or does attach to the land by reason of the prospective construction of the railroad speculative? The railroad may never be completed. Its construction for various reasons may fail to have its supposed effect. Again, if we attempt to fix the enhanced value of the land because of the prospect of the railroad being constructed and completed in the future, do we not fix or ascertain the value of the land taken with reference to the future and not to the time when taken? and is not that value predicated upon an uncertain contingency, and speculative? It is my conclusion after much reflection and thought upon the subject, that a valuation thus ascertained and fixed would be speculative in its character and would not be the actual value of the land taken, at the time when taken. When the government *needs* my land it has the sovereign right to take it; and when it takes it by virtue of such sovereign right and power, it is bound by the constitution to pay me the value thereof at the time it is taken. The government cannot speculate upon contingent benefits in lieu of the land actually taken, nor can the owner speculate upon what would be, thereafter, the enhanced value of the land, after the purpose for which it is taken is completed. *Robbins, Respondent, v. the Milwaukee and Horicon Railroad Company*, 6 Wis., 636. The commissioners should determine what would be a just compensation for the land taken, when taken. They were to decide questions of present value and not to speculate in respect to the probable consequences of constructing and operating a railroad. These are too uncertain to be made the subject of judicial enquiry. *The C. and N. Falls, R. Co., v. Payne*, 16 Barbour, (N. Y.) 273. See opinion of court on page 276.

Upon the whole it seems to me that the actual value of the land when taken without reference to enhanced value, given to it, common to other land owners along the line of the road, by reason of the prospective construction of the railroad in question, through the land, is as nearly a just compensation, when everything is considered, within the meaning of the Constitution as can be arrived at. If this, as a rule, is departed from, there is manifest danger of injustice being done to the Railroad Company or to the public, as the case may be. If it is adhered to, then the land owner receives a just compensation for his land, which is taken, and not an excessive or unjust compensation. In addition to ascertaining the actual value of the land the fourteenth section of chapter forty-two of the Code requires the commissioners to ascertain the damage to the residue of the tract, beyond the "peculiar benefits," to be derived in respect to such residue from the work to be constructed or the purpose to which the land to be taken is to be appropriated. "Peculiar benefits" as employed in said section I understand to mean, such benefits as particularly and exclusively affect the particular lot, parcel or tract of land, whereof a portion is condemned, and not advantages, of a general character, which may be or are derived in common, by the owners along the line of the improvement or road, or benefits, derived by the country at large.

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It appears by the record, that on the 4th day of September, 1873, the Railroad Company paid into said circuit court \$96, being the amount reported by the commissioners in this case, for the land taken, including interest thereon, from the date of the report to the time of payment.

For these reasons, the decision and judgment of the circuit court of said county of Fayette, setting aside and recommitting the said report of the commissioners, must be reversed and annulled, and the appellant recover its costs here against the appellee, William Tyree. And this Court,

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proceeding to render such judgment in the cause, as the said circuit court ought to have rendered, it is adjudged and ordered, that the said report of the commissioners be, and the same is, hereby confirmed, and that the same be recorded on the chancery order book of the circuit court of said county of Fayette. It is further considered and adjudged, that the said Chesapeake and Ohio Railroad Company do pay to the said William Tyree, his costs incurred in this cause in the said circuit court.

Paull and Moore, Judges, concurred.

Hoffman, Judge, absent, by reason of sickness.

JUDGMENT REVERSED, AND CORRECTED IN APPELLATE COURT.

## WHEELING.

## KING v. BOARD.

July 15, 1874.

1. In a proceeding in equity, in the nature of a foreign attachment, against a non-resident of the State, to subject his property, in the State, to the payment of a debt, under the eleventh section of chapter one hundred and fifty-one of the Code of Virginia of 1860, it is not material that the order of attachment, endorsed on the summons, by the clerk, should specify the property of the debtor mentioned in the affidavit in which the order of attachment was issued. 1874.  
June Term.
2. Although, in such case, the order of attachment does not recite that an affidavit has been filed or refer to any affidavit on its face, still, if it sufficiently appears by the record that a sufficient affidavit was filed by the plaintiff, with the clerk, when the order of attachment was issued, the order of attachment being otherwise sufficient, is good.\*

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\*The following is section eleven of chapter one hundred and fifty-one of the Code of Virginia, ed, 1860, alluded to in the opinion of the Court :

"A claim to any debt, or to damages for breach of any contract against a person who is not a resident of this state, but who has estate or debts due him within the same, may, if such claim exceed twenty dollars, exclusive of interest, be maintained in any court of equity for a county or corporation in which there may be any such estate, or a defendant owing any debt to such non-resident. When a person has such claim, or when a person claims to be entitled in equity to any money or property from a person against whom and for which an attachment might be sued out of a clerk's office, if the claim were recoverable at law, there may be an affidavit according to the nature of the case, conforming as near as its nature will admit, to what is specified in previous sections; and such affidavit may be at the time or after the institution of the suit. Upon such affidavit, the plaintiff may require the clerk to endorse on a summons an order to the officer to whom it is directed to attach the specific property (if any be mentioned in the affidavit), and the debts due, or to become due by other defendants (if any), to the defendant against whom the claim is, and also any other estate of that defendant, whether in his own hands or in the hands of other defendants. Any attachment under this section shall be executed in the same manner, and shall have the same ef-



1874.  
June Term.

King  
v.  
Board.

Appeal, by Adam Board, from a decree of the circuit court of Jackson county, rendered on the 3d day of August, 1872, in a suit in chancery, in the nature of a foreign attachment, wherein George S. M. King was complainant and said Adam Board, Absalom Board, Sarah Board, Rachel Pringle, John H. Board, Thomas Board and John H. Riley were respondents.

The material facts sufficiently appear in the opinion of the Court.

The Hon. Robert S. Brown, judge of said circuit court, presided at the decision below.

*Henry C. Flesher.* for the appellant.

*John H. Riley,* for the appellees.

HAYMOND, PRESIDENT :

This is a bill in the nature of a foreign attachment. The plaintiff commenced his proceeding against his debtor Absalom Board, and others, in the circuit court of Jackson county on the 8th day of January, 1868, upon the summons issued in the cause, and the clerk at the instance of the plaintiff endorsed thereon, substantially, the order of attachment required by the eleventh section of chapter one hundred and fifty-one the Code of 1860. The plaintiff filed his bill, regularly, against the defendants named in the summons. The sheriff levied the order of attachment upon the interest of the defendant Absalom Board, in certain real estate, situate in said county of Jackson, in the bill and proceedings mentioned. The defendants Absalom Board, Adam Board, and John H. Riley filed their answers. The defendant Adam Board in his answer sets up a claim to the real estate attached in the cause, and at the time he filed his answer he moved to quash the order of attachment, which motion was over-

fect as at law, but the proceedings therein shall be the same as in other suits in chancery. And the court, or in vacation thereof, a judge of a circuit court may interpose by injunction, or the appointment of a receiver, or otherwise, to secure the forthcoming of the specific property sued for, and so much other estate as will probably be required to satisfy any future order or decree that will be made in the cause.

ruled by the court. The debtor Absalom Board did not move to quash the order of attachment. Such proceedings were afterwards regularly had in the cause as that the court, on the 3rd day of August, 1872, decreed in favor of the plaintiff against the debtor Absalom Board for the sum of \$162.22, with interest from the 6th day of April, 1872, till paid, and the costs of the suit; and also decreed that the land attached by the sheriff in the cause be sold, &c., to pay the debt and costs, and appointed a special commissioner to make the sale &c. From this decree the defendant Adam Board has appealed to this Court; and, by his counsel, assigns the following grounds of error in said decree, viz:

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June Term.

King  
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Board.

"*First.* That the endorsement on the summons, issued in the cause, requiring the sheriff to attach the estate of the petitioner's co-defendant Absalom Board, or to perform any other act in premises, has none of the essentials of a valid attachment, because the order of attachment does not run in the name of the State of West Virginia, and he cites the Constitution of West Virginia, of 1867, Code of 1868, p. 31. It is true the order of attachment endorsed on the back of the summons, by the clerk, does not, on its face, run in the name of the State of West Virginia, but the summons in the cause on which it is endorsed does. The question raised by this assignment of error was decided by the Supreme Court of Appeals of this State at the July term, 1871 in the cases *M. Gutman & Co., v. The Virginia Iron Company*; *McClellan & Knox v. Idem*, 5 W. Va., 23. In these causes Judge Moore delivered the opinion of the Court in which it is expressly held" that the order of attachment provided for in the act of 1867, chapter one hundred and eighteen, section one, is not a writ, and need not run in the name of the State." I do not think it proper to disturb this decision, at this time, by expressing dissent therefrom, as a different ruling now might be productive of great injury, and the ruling being upon a constitutional question it ought not now to be de-

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June Term.

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Board.

parted from, for slight cause. The cases above cited were actions at law, and the proceedings by order of attachment were had under chapter one hundred and eighteen of the acts of the Legislature of 1867, page one hundred and forty-seven. This chapter is entitled "An act to amend and re-enact sections one and three of chapter one hundred and fifty-one of the Code of Virginia" and was passed 27th February, 1867. The proceedings in the present cause were had under the provisions of the eleventh section of chapter one hundred and fifty-one of the Code of Virginia of 1860 which was not repealed or affected by the said act of 1867.

"*Second.* Because the court overruled the motion of petitioner to quash said order of attachment."

"*Third.* Because the property was not specified in the said order of attachment."

"*Fourth.* Because no order of attachment was, in fact, ever issued, and the act of 1867 is cited."

"*Fifth.* Because the order endorsed on said summons does not show that the plaintiff had filed his affidavit, as required by law, and said act of 1867, is again cited."

An order of attachment, endorsed on the summons in the cause, levied by the sheriff on estate of the debtor, not specified in the order, would be as valid and binding, under the eleventh section of chapter one hundred and fifty-one of the Code of 1860, of Virginia, on the property so levied on, as if levied on the specific property of the debtor mentioned in the affidavit, upon which the order of attachment issued. This is manifest from the provisions of the section on that subject. It must follow, therefore, if the order of attachment does not direct the sheriff to attach the specific property of the debtor, mentioned in the affidavit, in a case like this, but directs the sheriff to attach the estate, both real and personal, of the debtor sufficient to satisfy the plaintiff's demand of \$184.85, with interest and costs of the suit; and the order is duly levied on real estate of the debtor in the county, and due return made thereof, that such

order and levy are valid and binding This proceeding is had against the debtor as a non-resident of this State, and the proceeding could only be had in a county where the debtor has estate. It is, therefore, proper that the bill should show that the debtor had estate in the county where the proceeding or suit is had. But it is not essential to the validity of the attaching order, and the levy thereof, that the property, mentioned in the affidavit, is not mentioned in the order in a proceeding of the character of this. This is not a suit in equity for the recovery of specific property from the defendant, Absalom Board, but, as before stated, it is for the recovery of a debt, from the absent debtor, by subjecting his estate, by order of attachment in the cause, to the payment thereof. Where the suit is for the recovery of specific property, it is then, perhaps, material that the specific property, sought to be recovered, should be mentioned in both the affidavit and order. The attaching order in this case was levied by the sheriff on the real property of the absent debtor, mentioned in the affidavit, situate in Jackson county. Proceedings in cases of this kind, under said eleventh section, are the same as in other suits in chancery.

As before stated, this proceeding is not under the act of 1867, cited by appellant's counsel, but is a proceeding under the eleventh section of chapter one hundred and fifty-one of the code of Virginia, of 1860, and there was an order of attachment, endorsed by the clerk, upon the summons. It is true that the order of attachment does not recite that the plaintiff has filed an affidavit, but it is sufficiently shown by the record that an affidavit was filed by the plaintiff, and it is certified as a part of the record and as being the affidavit of the complainant on which the order of attachment was issued. And the grounds, and only grounds, upon which the appellant moved the court to quash the attachment, as disclosed by the record, were :

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v.  
Board.

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June Term.

Kin;  
v.  
Board.

*First.* That the affidavit on which the attachment is founded is insufficient.

*Second.* That the order of attachment endorsed on the summons did not run in the name of the State.

*Third.* That the property is not specified in said order.

Certainly the court, in overruling the motion to quash, heard and considered the motion on the affidavit, as well as the other proceedings involved in the determination of the motion. The affidavit was made by the plaintiff before the clerk, who issued the summons and endorsed thereon the order of attachment, and it bears the same date as the summons and order of attachment. The affidavit is full and substantially sufficient on its face, under the provisions of said eleventh section. However, it is not insisted here by the appellant's counsel, that the affidavit, appearing by the record, is insufficient. Upon the whole, the grounds of error assigned by the appellant's counsel, are not well taken.

There being no errors assigned by the appellant's counsel, except those above considered, and no others in any way brought to the attention of this Court, and the Court seeing none in the decree appealed from, the said decree of the circuit court of the county of Jackson, rendered in this cause on the 3d day of August, 1872, must be affirmed with costs and \$30 damages, in favor of the appellee, George S. M. King, against the appellant, Adam Board, and the cause remanded to the circuit court of Jackson county, for the further proceedings therein to be had, according to the rules governing courts of equity in such cases.

Paull and Moore, Judges, concurred.

Absent, Hoffman, Judge, by reason of sickness.

DECREE AFFIRMED AND SUIT REMANDED.

## WHEELING.

JONES v. CUNNINGHAM.

July 15, 1874.

- 1 If an appeal is taken, from a decree of a circuit court to this Court and the case is within its jurisdiction, the matter in controversy must be inquired into and determined; and if the decree be found to be right, in all other respects, and erroneous as to costs, this Court will not reverse the decree, *because* of such error, as to costs; but may, in a proper case, correct the decree, as to the error, and affirm it, as corrected.
2. When the plaintiff, by bill of discovery, seeks a discovery from the defendant as to any matter of fact, the answer is evidence for the defendant, so far as it is responsive to such bill, as to the fact as to which the discovery is sought; yet as to matter in respect to which no discovery is sought, if the answer alleges anything affirmatively, it is not evidence for the defendant, but it is to be proved by him.\*

1874.  
June Term.

Appeal, with stay of proceedings, granted by the Hon. Vermont Ward, judge of the ninth judicial circuit, on the petition of William A. Jones, from a decree of the circuit court of Kanawha county, rendered on the 31st day of May, 1873, in two suits therein pending, which came on to be heard together, wherein said Jones was complainant and John S. Cunningham and Edward B.

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\*The following is section seven of chapter ninety-six of the Code referred to in the opinion of the Court.

\*7. "Any borrower of money or other thing may exhibit a bill in equity against the lender, and compel him to discover, upon oath, the money or thing really lent, and all bargains, contracts, or shifts relative to such loan, and the interest or consideration of the same; and if it appear that more than lawful interest was reserved, the lender shall recover his principal money or other thing with six per cent. interest only, but shall recover no costs. If property has been conveyed to secure the payment of the debt, and a sale thereof is about to be made, or is apprehended, an injunction may be awarded to prevent such sale pending the suit."

1874.  
June Term.  
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v.  
Cunningham.

Knight, trustee in a deed of trust executed by said Jones and his wife to secure said Cunningham in the sum of \$2,000, with the interest thereon, and dated April 26, 1871, were respondents.

The other facts appear in the opinion of the Court.

The Hon. Joseph Smith, judge of said circuit court, presided at the hearing below.

————— for the appellant.

*Smith & Knight*, for the appellee, Cunningham.

HAYMOND, PRESIDENT :

On the 26th day of April, 1871, the plaintiff borrowed of the defendant, Cunningham, the sum of \$2000, and executed his note therefor to Cunningham, payable two years after date, with ten per cent interest, payable semi-annually in advance ; and plaintiff by deed, of the date aforesaid, conveyed to defendant, Knight, a tract of land containing fifty acres, more or less, situate in Kanawha, county, in trust to secure to defendant, Cunningham, said debt and interest from date, at the rate aforesaid, and payable, as aforesaid ; the debt to be paid in two years from the date of the deed. All of which appears on the face of the deed of trust which was duly acknowledged by the plaintiff, and admitted to record in the Recorder's office of said county, on the 27th day of April, 1871.

At the execution of the deed of trust plaintiff paid Cunningham \$100, interest for six months, and afterwards, on April 3rd, 1872, he paid him \$200 more, to be applied to interest on the trust deed as stated in a receipt then given by Cunningham to plaintiff, therefor.

On the 20th day of May, 1873, plaintiff filed his bill in the clerk's office of the circuit court of said county, in which he alleges, substantially, the facts above stated and plaintiff filed with the bill a copy of the deed of trust. The bill prays for a discovery of the usury, &c.

It prays that the note and deed of trust may each be declared void, as to any excess of interest agreed to be paid above legal interest, and that the proper credits be given, &c. The bill appears to have been sworn to on the 5th of May, 1873; when process issued does not appear. But on the 19th day of May, 1873, the day previous to the filing of the other bill, the plaintiff filed his bill of injunction, in said clerk's office, enjoining and restraining the defendants from proceeding to sell the land, under the deed of trust, during the pendency of the first named cause, alleging that the trustee had advertised the land for sale under the deed of trust on the 31st day of May, 1873. The last named bill is substantially the same as the first, except it does not pray for a discovery. The bills were evidently filed under the provisions of the seventh section of the ninety-fifth chapter of the Code of this State. The plaintiff does not, in either of the bills, offer to pay the amount due on the debt, with legal interest, after deducting the two payments; nor does he allege that Cunningham claims or demands more on the debt than he is legally entitled to receive; nor does he allege that he has demanded of Cunningham that the usurious interest, or any part thereof, should be deducted or credited, and that Cunningham refused or claimed the usury. In fact he does not directly or indirectly allege that he, at any time, before or after the debt became payable or the land was advertised for sale, had any conversation or communication of any kind with Cunningham, or the trustee, on the subject.

Cunningham, in his answer, admits the loan and the deed of trust as alleged, and that at the date of the loan plaintiff paid him \$100 for six months' interest in advance, and that plaintiff, on the 3d day of April, 1872, paid him, on the loan, the further sum of \$200, and he avers these are the only payments ever made on the loan. He also states that he advised the trustee of the payments, and instructed him to allow plaintiff credit for said payments, and not to require more than six per cent. interest

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on the debt, if plaintiff did not see fit to pay more; but that the plaintiff never approached him or the trustee with reference to the payment of the loan, or with reference to the sale, and that plaintiff did not have reason to believe that his credits aforesaid would not be allowed, or that the ten per cent. interest would be required, if he did not choose to pay it; that the purpose of the plaintiff in rushing into equity was to harrass him and without right or equity hinder and delay him in making his debt; that he credited plaintiff with the full amount of said payment on the debt. He prays that the injunction may be dissolved and plaintiff's suit dismissed.

The trustee Knight, in his answer, admits that he advertised the land for sale under the deed of trust, as stated in the bills, at the instance of Cunningham; that he (Knight) was advised by Cunningham that he could not exact the ten per cent. interest specified in the trust, and was instructed by Cunningham not to require the same, if plaintiff did not see fit to pay it, or if a sale was made under the deed of trust; that Cunningham informed him of the payments made by plaintiff, and he was fully prepared to allow the payments in settling with plaintiff, and in making a sale under the deed of trust. He also states that he has always intended to allow said payments, as credits to plaintiff, on the trust debt; that plaintiff had never approached him with reference to the matter, or said a word to him about it, and never offered to pay any part of the balance, and that if plaintiff had come to him instead of rushing into court he would have learned that nothing more was demanded or required of him than the payment of the balance due on his just indebtedness to Cunningham computed at legal interest.

These answers are made under oath.

Afterwards the causes were heard together by the circuit court of said county by consent of the parties, upon the bills, exhibits, answer of John S. Cunningham to each of the bills, the answer of Knight (trustee) to the bill of injunction, with general replication to each answer, and

upon the motion of Cunningham to dissolve the injunction; and it is recited in the decree "and the defendant Cunningham only claiming in his answer legal interest upon the debt secured in the deed of trust filed as an exhibit in these causes, and having credited plaintiff, in his answer, for all the payments he claims to have made on the debt aforesaid, and the court ascertaining that there is now due defendant Cunningham on said trust debt the sum of \$1,932.24, including principal and legal interest to date, after allowing all just credits, and sets-off, it is therefore adjudged, ordered and decreed, by the court, that the injunction heretofore awarded plaintiff be dissolved." The decree further recites: "And it not appearing to the court that the plaintiff had any reason or occasion to come into court for redress, or that the defendants or either of them were requiring the plaintiff to pay more than the amount justly due from the plaintiff to the defendant Cunningham, and these causes being now adjudicated, it is further ordered that both causes be dismissed and that the plaintiff pay to the defendants their costs by them expended including \$25 statute fee as allowed by law."

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An appeal has been allowed by a circuit court judge to this court.

It is difficult to determine whether the appeal as prayed and allowed, is an appeal and *supersedeas* to the whole decree, or only so much of it as dissolves the injunction? From the language of the petition and the order allowing the appeal and *supersedeas* perhaps it might be considered that they apply only to so much of the decree as dissolved the injunction and decreed costs and "\$25 statute fee" to the defendants. However, I think the appeal and *supersedeas* may be considered as allowed to the whole decree. Adopting this view the court seems to have allowed the plaintiff all the payments to which he could be entitled and ascertained the true aggregate amount of principal debt with legal interest up to the date of the decree, after deducting all the credits which

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plaintiff claimed ; and it is not claimed in the assignment of errors that the sum so ascertained is erroneous. There are no depositions in the cause. It was heard upon the bills, exhibits, answers and general replication thereto. The plaintiff having received credit for all he claimed, the payments being admitted, and only two in number, and the date and amount of each credit being clearly shown by the bill and answer of Cunningham, there was no necessity or propriety in the court referring the cause to a commissioner to ascertain the amount due Cunningham from plaintiff and the court did not err in ascertaining the amount without the intervention of a commissioner—The plaintiff was not and could not be prejudiced thereby. The plaintiff having been allowed all he claimed, not only by Cunningham in his answer, but by the court, there was no necessity or propriety of longer continuing the injunction. To have done so would have been unjust to the defendant Cunningham. He was entitled to have the money justly and lawfully due him from the plaintiff. If there ever was any necessity for the injunction it certainly ceased when plaintiff was allowed credit to the full extent he claimed. The court therefore did not err in dissolving the injunction.

But the plaintiff claims that it was error in the court to decree against him for costs and \$25, attorneys' fee. The \$25 is not allowed as an attorneys' fee. The thirteenth section of chapter one hundred and thirty-eight of the Code provides that the clerk shall include in the costs to the prevailing party in a chancery cause, not less than ten, nor more than thirty dollars, as the court may prescribe. It is evident that the \$25, allowed in the decree as a "statute fee," was intended for the amount prescribed by the court to be taxed by the clerk in the costs under said thirteenth section, and if it was right to allow costs to the defendants this is not error. But the seventh section of the ninety-sixth chapter of the Code of this State, provides that if it appear that more than lawful interest was reserved the lender shall recover his

principal money or other thing with six per cent. interest only, but shall recover no costs. The injunction is part of the original cause, and in aid of it, and must be so considered. The injunction is authorized by the last clause of said seventh section. Cunningham in his answer admits that unlawful interest was reserved as charged in the bill, but he avers that he directed the trustee to credit all the payments and charge only legal interest on the money loaned; if the plaintiff objected to paying the usury, and if a sale was made, to only charge the legal interest. This is affirmative matter. It does not appear from evidence nor is it even averred that plaintiff had notice that Cunningham did not claim the unlawful interest, but relinquished it. From the face of the advertisement plaintiff might well infer that Cunningham was claiming when he directed the sale, and would claim, interest, according to the contract and the face of the deed of trust. When the plaintiff, by bill of discovery, seeks a discovery from the defendant as to any matter of fact, the answer is evidence for the defendant so far as it is responsive to such bill, as to the fact as to which the discovery is sought; yet as to matter in respect of which the bill seeks no discovery, if the answer alleges anything affirmatively, it is not evidence for the defendant, but it is to be proved by him. *Taylor v. Moore*, 2 Rand. 575 and 576, opinion of judge Green; 2 Rob. (Old) Prac. 330.

But this Court has appellate jurisdiction in civil cases of this description only where the matter in controversy exclusive of costs is of greater value or amount than \$100.

"The matter in controversy in the suit, and upon which the judgment or decree is pronounced, must not only be of the value aforesaid, but the controversy in relation to the matter of that value must be continued by the appeal. If the case be within the jurisdiction of the court, the matter in controversy must be inquired

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into and determined; and if the decree or judgment be found right in all other respects, and erroneous as to costs, such error may be corrected, as might any other error, no matter how small the amount." *Ashby v. Kiger*, 3 Rand. 165-166.

In the case of *Caleb Boggess' Heirs v. Thomas Robinson's Heirs*, decided by the Supreme Court of Appeals of this State, 5 W. Va. 402, it was *held* that a decree in the court below against a person who was not a party to the bill, might be corrected in the court below on motion and can be corrected in this Court. But it was *further held*, in the same case, that "whether the decree for costs is as it should be or not is a question that cannot be looked into by this Court, as the appeal cannot be supported on any other ground." The decree of the circuit court is erroneous in allowing the defendants costs and the decree in that respect will be corrected here and affirmed.

The decree of the circuit court for the reasons above stated must be affirmed, as corrected, with costs to the appellee Cunningham in this Court and \$30 damages.

Paull and Moore, Judges, concurred.

Absent, Hoffman, Judge.

DECREE CORRECTED IN APPELLATE COURT AND AFFIRMED.

## WHEELING.

HENRY v. DAVIS.

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Upon a motion to grant a new trial, on an issue out of chancery. and refused by the court, the bill of exceptions certifies the evidence, and not the facts proved on the trial.—HELD: 1874.  
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1. An appellate court will not take cognizance of the case and reverse the judgment, unless by rejecting all the parol evidence for the exceptor, and giving full force and credit to that of the adverse party, the decision of the court below still appears to be wrong.
2. Instructions to the jury should be pertinent to the issue, and not addressed to a different inquiry than that contained therein; and should not be couched in ambiguous language, or be of doubtful meaning, and if otherwise, they should be refused.

Appeal, by Henry G. Davis, from a decree of the circuit court of Doddridge county rendered on the 3rd day of May, 1872, in a suit therein pending, wherein Eugene Henry was complainant and said Davis, Benjamin Wilson, T. K. Knight and Benjamin F. Martin, respondents.

The material facts appear in the opinion of Paull, Judge.

The Hon. Chapman J. Stuart, judge of said circuit court, presided at the trial and hearing below.

*Caleb Boggess* for the appellant.

*Daniel Lamb and C. C. Cole*, for the appellee.

PAULL, JUDGE:

The following principles appear to have been decided by the court of appeals of Virginia, in regard to issues out of chancery:

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*First.* When an issue is tried it is under the superintendence of the court, which will prevent the introduction of improper testimony; and if the verdict be against evidence, the court will so certify, and the chancellor will not be satisfied with it. *Plesant Shore & Co. v. Ross*, 1 Wash., 156; *Southall v. McKeand, Id.*, 336.

*Second.* It is matter of sound discretion whether the chancellor should direct the issue, or decide the questions of fact for himself; and like matter of discretion, whether he should set aside the verdict on the issue or not; he is not bound to set it aside in deference to the certificate of the judge of the court of law against it. *Grigsby v. Weaver*, 5 Leigh, 197. Judge Carr delivering the opinion of the court in that case, said: "Issues are not directed to get a new supply of evidence when they have not enough; but where there is clashing and conflicting evidence leaving the fact in doubt, and rendering it necessary to weigh the character and credibility of witnesses, the chancellor who sees them only on paper, considers that his conscience can be better satisfied by the verdict of a jury who shall see and hear them."

Brooke J., who concurred in the opinion, said: "Weighing the verdict of the jury which is supported by the evidence of the record, I think, (admitting the chancellor was right in directing the issue) that the verdict must outweigh the certificate of the judge. Both were intended to satisfy the conscience of the chancellor."

*Third.* Upon all trials at law of issues out of chancery, all the proceedings upon the trial of the issues as spread upon the record thereof, constitute part of the certificate of the verdict, and with it become part of the chancery record. *Watkins and wife v. Carlton*, 10 Leigh, 560. Judge Tucker delivering the opinion of the court, says: "And upon this point, I observe that I shall take the whole proceedings in the court of law upon an issue directed out of chancery for the purpose of ascertaining a particular fact, to be part and parcel of the chancery cause."

The court of law is but ancillary to the court of chancery ; it has no jurisdiction in such case, except that which is derived from the chancellor's order ; it must pursue its directions, admitting papers to be read which he orders to be read ; and, if required, it must certify any instructions which are given to the jury, that the chancellor may decide whether they were rightly given or not ; finally, it can give no judgment on the verdict, but must certify it to the court of chancery to avail there as it may."

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*Fourth*, Upon an issue directed out of Chancery the verdict of the jury is conclusive when there is no exception spreading the facts proved upon the record. *Fitzhugh's Exors. v. Fitzhugh*, 11 Gratt. 210. In this case it was held, when an issue is directed in a chancery cause, and a verdict is found, to which no exception is taken and a decree is rendered thereon, the facts found in the verdict must be regarded in the appellate court, as the established facts in the case.

From the views and principles thus presented in regard to chancery issues, let us endeavor to understand, what is now the position of the chancellor, and of the appellate court, and what are their respective powers or duties, and the views by which they shall be controlled.

The chancellor unable from the evidence in his possession, to determine satisfactorily what is the fact in controversy, directs an issue to be found and tried in a court of law, that he may have the aid or benefit of the verdict of a jury. It is in cases generally, if not exclusively, of conflicting evidence, involving the credibility of witnesses, that such issues are directed. This mode of proceeding by chancery courts, was not founded, I apprehend, on the idea, to any extent, that a body of twelve men, was more competent than the courts themselves, to make the proper deductions, and the more readily and truly to ascertain the fact in question, if exactly the same evidence in the same form was before them, as before the



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jury. But this jury trial was based upon the fact, that before the jury additional testimony might be introduced; but especially that the jury would be able to see the bearing and manner of the witnesses on the trial, and to form a better estimate of their credibility in cases of conflict and of doubt. Of these matters, formerly, the chancellor could know nothing—the jurisdiction of the law and chancery courts being vested in different persons; this then was the chief advantage sought for in this mode of proceeding. The verdict was certified to the chancellor, and might or might not be accompanied with a certificate of the facts proved, or of the evidence, or of the opinion of the judge who presided at the trial, or of any of the proceedings which attended it. The chancellor was in no way bound by the verdict, when received. It was not at any time, and is not now, anything more than a mere opinion, whose chief value is supposed to consist in the way in which it was or is obtained. It has no legal or binding effect upon any court, tribunal, person or thing whatever; and this is equally true whether the trial in which it was had appeared from the record to have been free from errors in the rulings of the court touching instructions, or evidence, or any other respect whatsoever. The chancellor did not sit as an appellate court to revise or review the action of the court of law, and did not grant new trials merely because there were errors in the proceeding. These were considered matters of indifference in themselves as it was in the power of the chancellor, in a review of the whole case, to prevent their operating any prejudice to the rights of the parties. All that he desired was additional information to be found in the verdict of the jury; and when this was furnished, and he was satisfied, the enquiry ended. If he was not satisfied, he might direct another trial, and so continue in this way his pursuit of information; and in this way he might obtain verdicts of an opposite character, but he was bound by none of them, and might decide the case according to his own views of

the evidence before him, or accept the aid of a verdict at his pleasure.

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When the jurisdictions of the chancery and law courts was separate, it is obvious that the appellate court and the chancellor occupied precisely the same relative position to the proceedings of the court of law, neither being present and having only the record to guide them. The appellate court had just the same means of judging of their character, and of arriving at just conclusions, respecting their effect in developing the fact in question, and might upon a review of the whole case, simply affirm, or reverse the decree of the chancellor, and itself make a final disposition of the cause. If, however, the case did not seem satisfactory to the appellate court, and there was reason to believe that fuller and more satisfactory information touching the fact in question might be obtained, that court might direct another trial by jury, upon its own motion—its powers and those of the chancellor being the same. In the case of *Ross v. Pynes* 3 Call. 568, there were two verdicts of the jury one way, and two certificates of the judges against them, as being contrary to evidence, and in each case the court of appeals said that the chancellor ought to be satisfied with the finding, notwithstanding the opinion of the judge; in other words the chancellor was not to wait and endeavor, by repeated trials, to secure an agreement between the court and jury which tried the case, as to the weight of the evidence; still the chancellor was at liberty, as seen by the cases, to inspect the whole record of the proceedings, and render his decision, according to the best dictates of his own judgment as informed or enlightened by the means thus employed; but the value to be attached to the verdict of the jury was intimated in that case, by the court of appeals, as well also as in the case of *Grigsby v. Weaver* in 5 Leigh., before cited, in which the certificate of the judge was against the evidence; but the chancellor disregarding it, entered a decree in

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accordance with the finding of the jury, and his action was affirmed by the appellate court.

Again, we note, particularly, the difference between a verdict in a case brought in a court of law, and a verdict rendered in an issue out of chancery: In the former case, the verdict if sustained and judgment entered upon it, becomes of binding and conclusive effect between the parties; hence the controlling importance of the rules, in admitting and excluding testimony, and in giving or withholding instructions, and in all the proceedings. Hence, for a material error in any of these respects, or if the verdict is plainly or palpably against the evidence, as well as for other matters, a new trial will be granted. It is very different however with a verdict in a chancery issue; its office is simply to inform or enlighten the judgment of the chancellor, and when he is satisfied upon a review of the whole case, what might be esteemed errors in a court of law, may be here disregarded. Nevertheless, if this mode of procedure is to be of any value, the results obtained are to be respected; the verdict fairly had is to be regarded, and have its proper weight in the ultimate decision, as intimated by the court in the cases before cited. Such are some of the principles appertaining to issues out of chancery when the two jurisdictions of law and chancery were vested in different persons.

But now the chancellor himself, as judge of the law court, presides over the trial of the issue, which he has himself directed. He has now the advantage, which his predecessor under the former system had not, to-wit: of seeing the manner and bearing of the witnesses, and the circumstances under which they testify. As we have seen, it was the absence of this advantage heretofore which led to this mode of proceeding. The verdict and proceedings are certified as heretofore, or at least supposed to be, to the chancellor; they still become a part of the chancery case, and all matters in reference to them, are addressed to the chancery court. The same

powers are still exercised by the chancellor, and his decree is founded upon the whole case, as now presented.

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So, also, the same position, to the case, is still held, by the appellate court.

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With this notice of the law, let us examine the case under consideration, and apply such of the foregoing principles as are requisite for its determination, in connection with the rules applicable to new trials.

Eugene Henry filed his bill in the circuit court of Doddridge county, in June, 1866, for a specific performance of a contract made between himself and the defendant Henry G. Davis bearing date on the 19th day of July, 1865, for the sale of a tract of land containing three hundred and thirteen acres, setting forth the provisions of the contract, and circumstances under which it was made. In November, 1866, defendant Davis filed his answer, resisting the execution of said contract on the ground of fraud, and in December, 1866, filed his cross bill, setting up the same ground or charges of fraud in the procurement of said contract, and prays for its rescission. At the October term 1867, the plaintiff Henry filed his answer to the cross-bill, denying all fraud and wrong.

Depositions were taken by the parties on either side, and at the May term 1869, the cause was heard on the pleadings aforesaid, with the replications to the answers, and on the exhibits and evidence, and a decree was rendered against the defendant Davis for the payment of the balance of the purchase money due upon said contract, and providing, if such payment was not made, that the said tract of land should be sold for payment thereof. From this decree an appeal was taken to the Supreme Court of Appeals. At the January term of that Court in 1871, the decree of the circuit court was reversed, and an issue out of chancery directed to try this question, to-wit: Whether the said Henry G. Davis at the time of entering into the contract of the 19th day of

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July, 1865, with the said Eugene Henry, had knowledge of and was fully informed as to the extent of the fraud practiced upon him by the said Henry, which induced him to enter into the said contract of the 9th of March, 1865. This issue was tried in the circuit court of Doddridge county, and at the September term 1871 a verdict was rendered that said Davis had knowledge of and was fully informed as to the extent of the fraud practiced upon him by said Henry, which induced him to enter into the said contract of the 9th of March, 1865, at the time of entering into the contract of the 19th day of July, 1865. The defendant moved the court to set aside the verdict of the jury, on the ground that the same is contrary to the evidence, and because of improper influences brought to bear upon the jury. This motion was overruled by the court. Certain instructions to the jury were asked for by the counsel of defendant Davis, which the court refused to give, and the defendant excepted, and set forth the instructions in two bills of exception which appear upon the record. Upon the motion for a new trial being overruled as before stated, the defendant excepted, and prayed the court to certify the evidence given on the trial to the jury, which was done, and the same appears in a bill of exceptions in the record. At its May term 1872, the circuit court rendered a decree against said Davis for the unpaid residue of the purchase money due upon said contract, and providing for a sale of the land for that purpose. From this decree an appeal is taken to this Court.

This case is now presented here for hearing and determination upon the former record, and upon all the proceedings of the court of law, had upon the trial of the issue, as directed by the Supreme Court of Appeals; and upon the review of the whole case, as thus presented, such order or decree must now be entered, as will be satisfactory to this Court sitting as a Court of chancery.

We observe, in the first place, that an inspection of the former record discloses nothing, which does or can

exert any commanding or controlling influence upon the decision now to be made. The Supreme Court of Appeals simply adjudged that the contract of the 5th of March, 1865, was procured by fraud, and that the same was void, or at least voidable, at the instance of the defendant Davis, and that in further determination of the matters in controversy between these parties, it was eminently proper, from the "vague and indefinite character of the testimony," that an issue should be directed to ascertain whether said Davis had knowledge of, or was fully informed, of the extent of the fraud practiced upon him by said Henry, which induced him to enter into the contract of March 5, 1865; and whether he had this knowledge or information at the time of entering into the contract of the 19th day of July, 1865. We are, therefore, limited in our present duty to the proceedings of the law court, and its results, as appearing in the present record. The chief matter here appearing, is the verdict of the jury. They find that defendant Davis had knowledge of, and was fully informed, as to the subject matter to which their attention was directed by the issues. What is our duty in regard to this verdict? Upon the authority of the cases heretofore cited, as well as from the nature of the proceeding itself, unless there is some controlling consideration otherwise appearing in the history of the case, the verdict should be respected; if there was no exception appearing in the record, the facts found by it, says one of those authorities, must be regarded as established. The Supreme Court of Appeals, in this case, has said that the testimony is "vague and indefinite;" the counsel, on both sides, have admitted that the testimony is contradictory, and an examination of the same fully confirms the suggestion of the court, and the admission of counsel. Upon its face rests uncertainty, conflict, doubt and discredit of witnesses. Under these circumstances, the verdict is entitled to peculiar regard. In determining the proper disposition to be made of the verdict on this motion for a new trial,

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we see no objection to applying the rules observed in courts of law, on similar motions, and these rules have been cited by counsel on both sides, and relied on in argument.

Here the *evidence* has been certified, and not the *facts* proved, in which case the rule, as laid down in *Carrington v. Goddin*, 13 Gratt., 587, applies, to-wit: the court will reject all the parol evidence of the exceptor, and give full force and credit to all the evidence of his adversary, and will not reverse the judgment, unless it then appears to be wrong. Upon a careful examination of the testimony, as contained in both records, as given to the jury, under the operation of this rule, we cannot say that the decision is erroneous, and, hence the verdict must stand, unless there is some other objection to it. Moreover, as before stated, the weight and credit of the testimony are largely involved in this case, and, under the authority of *Patteson v. Ford*, 2 Gratt., 18, this Court will not reverse a judgment, where the case before a jury depends on the credibility of witnesses: and this regard for the verdict, under the circumstances, accords with the spirit of the cases hereinbefore cited. It is not perceived that any elaborate and detailed statement of the evidence is necessary here to be made, in order to sustain the view and effect of the same, which we have taken, and no rule of law would be thereby settled, and it will be omitted, as subserving no useful purpose: and this was the course pursued in the case aforesaid, in 13 Gratt., the conclusion of the court, upon the evidence alone, being stated. Under the foregoing rules and principles, there was no error in overruling the motion for a new trial, or to set aside the verdict as contrary to the evidence. See, also, Grayson's case, 6 Gratt., 712.

It is said, however, that the court erred in refusing to give the instructions, in the bills of exception, marked numbers *two* and *three* in the record. Let us examine them; the latter part of the instruction contained in bill number *two* alone needs notice; it recites "that if the

jury believe that defendant Davis was induced to enter into the latter one, (supposing that by the "latter one," is meant the contract of July 19, 1865,) by false statements or fraudulent assurances made by said Henry at the time of so entering into it, they must find for the defendant Davis." The exact pertinency of this instruction to the issue, does not appear. The question which the jury was to determine by their verdict, was this: Had the defendant Davis knowledge of, or was he fully informed, at the time of entering into the contract of the 19th of July, 1865, of the extent of the fraud practiced upon him by said Henry, which induced him to enter into the contract of the 9th of March, 1865? Does it follow, as a necessary consequence, at all, that if Davis was fraudulently induced to enter into the contract of July 19, 1865, at *the time of so doing*, that he was not fully informed of the extent of the fraud practiced upon him, inducing him to enter into a contract of an earlier date? Moreover, the language of the instruction is ambiguous, rendering its meaning somewhat doubtful.

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The *second* instruction is liable to the same objection. It is admitted in argument that it is justly liable to criticism; its meaning or construction must be determined by a course of reasoning, or by the substitution of other words than those that are employed; whether the true meaning has then been determined must still be a matter of inference, rather than absolute conclusion. Still the instruction directs the attention of the jury to a different inquiry than that contained in the issue; that simply was whether he had knowledge or full information as to a certain state of things; whereas the instruction says, whether, in effect, he had sufficient information to *induce him to believe* in a certain state of things; this is going beyond the limits of the issue. The instructions seem to be erroneous, and liable to mislead the jury, and we think there was no error in refusing them. Any question touching the time when these instructions were asked for during the progress of the trial, does not now seem to properly arise upon the record for decision.



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The attention of this Court was called during the argument, to a memorandum found in the record, that *three* bills of exception were tendered by the defendant to the opinion of the court, and which were received, signed and sealed by the court, and ordered to be made a part of the record; two bills appear upon the record Nos. 2 and 3. The inference is, that the missing bill was not copied into the record, when the same was made out; if the record is defective, the remedy is by *certiorari*. This case was submitted, without asking for the writ and the absence of the bill is no ground of complaint. Upon the review of the whole case, the proceedings and evidence, it seems to me that this Court must be satisfied with the verdict, as furnishing the facts for its decision. The parties, so far as it appears, have submitted to the jury all the evidence within their power; no sufficient exception has been taken by either party during the progress of the trial; the finding has been approved by the chancellor, who presided as a court of law, and who had all the advantage of seeing the witnesses, and observing the circumstances and influences under which they testified. Of these this Court can know nothing: in the case of *McRae's Exor. v. Woods' Exor.*, 1 Hen. and Munf. 548, being also an issue out of chancery, judge Tucker says; "ignorant of the character of the witnesses; I know not whom I ought most to credit or discredit; I must therefore confide in the opinion of the jury, who are the constituted judges in such cases:" And it is manifest in that case, as well as others, which have been cited, that the court of appeals thought the chancellor ought to have been satisfied with the finding of the jury. Was the decree which the chancellor entered the proper one, is the only remaining question; it is for the unpaid residue of the purchase money due upon the contract.

It has been suggested that the equity of the case did not, in the opinion of the Supreme Court of Appeals, stand alone upon the fact in the issue; that there were two others, to-wit: that Davis was still laboring under

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the pressure or influence of the original transaction, or laboring under the delusive opinion that the first contract was binding upon him; and, that he was influenced to enter into the second contract, by the representations made by Henry, at the time of entering into it, that the asphaltum would be found as represented, at the time of the original purchase; and, it is now claimed that these facts should be allowed due weight in determining the final equity of the case. It is said that the Supreme Court was of opinion, that if the above facts are true, that Davis was not bound by this contract of the 19th of July, 1865. The opinion of the Court is explicitly expressed in the following language: "If Davis entered into the contract of July 19, 1865, with complete knowledge of the fraud practiced upon him in the first contract, which he was at liberty to rescind, he will be bound by it;" for which opinion authorities are cited. And, because the fact involved in that opinion was left in doubt and uncertainty, the issue was directed. The language of the Court, in reference to the two foregoing facts, was used subsequently to the announcement of the opinion above stated, and in entire subordination to it. That opinion has concluded the rights of defendant Davis in this controversy, if the fact directed to be ascertained in the issue was found against him by the verdict of a jury to which no sufficient exception could be urged, and the conscience of the chancellor should be satisfied. If entirely independent facts, not embraced in the issue could still control the final decision, it is not easy to see why the issue was directed at all. Moreover, all the proceedings in the case, and the action of the court from the beginning to end, have contemplated one or the other of the two results, either the specific performance of the entire contract, on the one hand, or its entire rescission on the other.

It is obvious that the duty of the Court has been very much circumscribed and limited by the rules and principles hereinbefore cited, and applicable to its action in

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cases like this; and if hardship still results from decreeing against the defendant the specific performance of a contract, springing from one all tainted with deceit and fraud on the part of his adversary, it is the unavoidable consequence of applying the law, as we understand it, to the case as it is now presented.

The decree of the circuit court of Doddridge county, rendered on the 3d day of May, 1872, is hereby affirmed, with damages and costs to the appellant.

Hoffman, Judge, not concurring in all the reasoning of the opinion delivered by Paull, Judge, filed the following opinion :

HOFFMAN, JUDGE :

In England, and in Virginia, the doctrine has prevailed, that, in a suit in equity, where there is evidence, that, if unquestioned, would sustain the plaintiff's case, which, however, is contradicted as to material facts, the chancellor, in absolute discretion, might direct an issue as to such facts, to be tried by a jury, in order to enlighten his understanding: And, that, when the trial was had, though it might appear that there was irregularity, yet if the proceeding antecedent, and the finding, were such as to satisfy the conscience of the chancellor and enable him to make a just decree, he might do so, and the decree would be effectual—beyond the province of an appellate court to reverse it.—This may still be law.—I do not now investigate the subject.

Moreover, the doctrine prevailed to some extent, that, in such a case, if the chancellor should not be satisfied with the finding of a jury, he might disregard it, and decree as if he had not directed the issue.

But, it is well settled, that an issue is not directed to enable a plaintiff to furnish evidence necessary to sustain his case. Then, the direction or re-direction of an issue can be proper and useful only because, if the proceedings

on the trial, are not in any way illegal or inequitable, the finding should control the decision of the court.

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In Virginia and in West Virginia, in a number of cases—among them, the case before us—it has been decided, that, when in a suit inequity, the testimony of different witnesses as to material facts, conflicts beyond the reach of reconciliation, and nothing paramount enables the court to decide as to the credibility of the witnesses contradicting each other, or in any way to decide the facts controverted, it is the right of the suitor to have such facts submitted to and found by a jury; and it is the duty of the court to direct an issue for the purpose—and not to do so is error.

Then, when, according to the absolute requirement of the law, an issue has been directed, if the court might arbitrarily disregard the entire proceeding, and—as if no issue had been directed and no finding had—might find the facts and decide the case, the right of the suitor to have and the duty of the judge to direct an issue and trial by a jury, of the facts, would be utterly unavailing. Such an absurdity as, to my perception, this would evolve, is so different from the “perfection of human reason,” that I cannot think it ought to be recognized as law.

Perhaps the later authorities warrant the adjudication by this Court, that, when, in a case in chancery, an issue is directed and tried, the testimony as to any one or more controverted facts so conflicts that it cannot be harmonized, if there be no other reason to set aside the verdict, it should stand and control the judgment of the court as to such facts—whether the evidence seems to the judge presiding, or the appellate court, to warrant the finding or not.—In a suit in chancery, the issue is more special as to the facts, and less embarrassed with law, than in a case at common law it generally is: And, therefore, the action of the jury is more likely to be correct, and the result of the trial ought to be more satisfactory.—It is

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especially convenient and important to society that the law by which the conduct of its members is regulated and their rights determined, should be simple and uniform.

For the reasons I have suggested, it seems to me, that when, in a case in chancery, an issue is directed and tried and the evidence conflicts, the finding ought to be accepted as decisive of the facts found, unless for cause sufficient to set aside a verdict at law, the finding upon the issue should be set aside.

Such an irreconcilable variance in the testimony of witnesses, as to material facts, as I have mentioned, I think exists in the case in judgment. And, if the principle I have suggested be true, this Court can not properly consider the credibility of the discrepant witnesses, or the weight of their conflicting testimony; but this Court must recognize the finding of the jury, acted on by the circuit court, as determining these matters.

In the points decided in this case, including the syllabus, HOFFMAN and MOORE JUDGES, concur with PAULL, JUDGE.

Absent, HAYMOND, PRESIDENT :

DECREE AFFIRMED.

## CHARLESTON.

## STATE v. STEWART.

February 25, 1874.

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|----|-----|
| 7  | 731 |
| 49 | 713 |

1. If a person, charged with felony, is entitled to be examined before <sup>1874.</sup> January Term. the county court of the county wherein the offence is charged to have been committed, it is too late after verdict of guilty and judgment thereon, against the prisoner, to claim, in the appellate court, for the first time, the right to such examination, and to claim that the judgment of the circuit court should be reversed, and the verdict of the jury set aside, upon the allegation by him, in his petition for the writ of error, that he had not been examined before the county court, upon the charge of felony in the indictment contained, and had not, by his assent, entered of record in the circuit court, dispensed with such examination.

The material facts in the case sufficiently appear in the opinion of the Court.

The Hon. Joseph Smith, judge of said circuit court, presided at the trial below.

*Attorney General Mathews* for the State.

*William A. Quarrier* for the defendant.

HAYMOND, PRESIDENT :

At a regular term of the circuit court held in and for the county of Kanawha, on the 3rd day of November, 1873, an indictment was found against James Stewart, by the grand jury attending upon said court, for a felony, in this, viz: "that James Stewart, on the 10th day of October, 1873, at the county aforesaid, in and upon the body of one Moscs Roy, feloniously did make an assault, and him the said Moses Roy, feloniously and maliciously did then and there cut and wound, with in-

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tent, him, the said Moses Roy, then there to maim, disfigure, disable, and kill against the peace and dignity of the State. And also for that the said James Stewart, afterwards, to-wit: on the 10th day of October, 1873, at the county aforesaid, in and upon one Moses Roy, unlawfully did make an assault, and him, the said Moses Roy, did then and there unlawfully, but not maliciously, cut and wound, with intent, him the said Moses Roy, then and there to maim, disfigure, disable and kill, against the peace and dignity of the State." Afterwards on the 6th day of November, and at the same term of said circuit court, the said James Stewart, so indicted, was led to the bar of said circuit court, in custody of the keeper of the jail, and he plead not guilty to the indictment, and thereupon came a jury, who being duly selected and impanelled and sworn, after hearing the evidence and arguments of counsel, found the said James Stewart, guilty, *as alleged in the second count* of the indictment, and fixed the term of his confinement in the penitentiary at one year. And they found him *not guilty upon the first count*. Thereupon the defendant Stewart moved the court to set aside the verdict of the jury and award him a new trial; and afterwards on the 6th day of November, 1873, the circuit court overruled the motion for a new trial, and rendered judgment upon the verdict of the jury, against the defendant Stewart, that he be taken, by the sheriff of the county, as soon as practicable after the rising of the court, from the county jail, thence to be removed to the penitentiary of the State, there to be kept in confinement for the period of one year. To this sentence and judgment of the circuit court, the defendant Stewart hath obtained a writ of error, from one of the judges of this Court, during vacation.

The only error assigned here is, that the circuit court erred in rendering judgment against the defendant (Stewart), without his having been previously examined by the county court of Kanawha county, upon the charges contained in the the indictment, or the fact of his hav-

ng waived such examination not having been entered of record, in the circuit court. The record does not disclose that the defendant at any time, before trial, objected to being tried upon the indictment, upon the ground that he had not been examined for the offense before the county court, according to the provisions of the act of the Legislature, approved April 3, 1873. He did not move to quash the indictment, or do any other act, before trial, by which the attention of the court would be directed to the fact as to whether he had been examined by the county court touching said charge. Nor did the defendant, after verdict against him, upon his motion for a new trial, and before final judgment on the verdict claim or intimate, to the court, that he had not been examined by the county court, upon the charges contained in the indictment, or either of them. The first complaint or intimation from defendant that he had not been examined by the county court upon the charges, or waived such examination upon record, is contained in his petition to this Court for the writ of error.

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The first section of the act of 3d of April, 1873, provides that "before any person, charged with a felony, is tried before a circuit court, he shall be examined as hereinafter provided, unless, by his assent, entered of record in such court, such examination be dispensed with." And the second section provides that "every such examination shall be had before the county court of the county having jurisdiction of the offense, at one of the terms held for the trial of causes." According to this act, the examination before the county court may be had before indictment. In chapter one hundred and sixty-nine, section eight, of the revised code of 1819, there is this provision, viz: "Before any person, charged with treason or felony, shall be tried before a superior court of law, he or she shall be examined in the manner prescribed by law, by the court of the county or corporation wherein the offence was committed; unless such examination be dispensed with, by the assent of the



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prisoner, entered of record in such superior court.' This act was passed 26th February, 1819.

The same provision is found, substantially, in the code of 1860, chapter two hundred and five, section one. It was held by the general court of Virginia in the case of *The Commonwealth v. Joseph Cohen*, that "after a verdict convicting a prisoner of felony, a plea in arrest of judgment that he has not been examined for the offense by a court of competent jurisdiction (alleging that the corporation court by which he was examined had no criminal jurisdiction) ought to be overruled, because the said plea suggests matter making no part of the record, but matter which, if true, is proper for a plea in abatement, or for a motion to quash the indictment." This decision was made at the June term, 1819. See 2 Virginia Cases, 158. Afterwards, the same court, at the November term thereof, 1820, in the case of *Angel v. The Commonwealth*, held that, "after verdict against a prisoner, he cannot move in arrest of judgment, that he was not examined for the felony of which he was indicted. The objection comes too late." See 2 Virginia Cases, 231.

Afterwards, at the June term 1822, of same court, it was held that "after verdict and judgment, in felony, against a prisoner, he cannot have a writ of error to reverse the judgment, on the ground that he was not examined for the felony of which he was indicted, and has been convicted,"—it is then too late to make the objection. 2 Virginia Cases, 314, case of *Campbell v. The Commonwealth*. So far as I can see, in these cases, the records did not disclose that the defendants had dispensed with the examination, by their assent entered of record.

If a person charged with felony is entitled to be examined before the county court, under the act of April 3, 1873, still it is too late after verdict and judgment against the prisoner, to claim in this Court, for the first time, the right to such examination and to claim that the judgment of the circuit court should be reversed upon the allegation, by him, in his petition, for the writ of

error, that he had not been examined before the county court upon the charge of felony in the indictment contained, and had not by his assent, entered of record in the circuit court, dispensed with such examination. The first and second sections of the act of 3d of April, 1873, and the eighth section of chapter one hundred and sixty-nine of the revised code of Virginia, of 1819, are substantially similar, and I see no reason why they should be construed differently, as to the subject matter under consideration. If a defendant, indicted for felony, desires to claim the benefit of the provisions of the act of 3d of April, 1873, he should do so certainly before verdict of guilty, and, perhaps, before the jury to try the cause are selected, impanelled and sworn. And the defendant should present the fact that he has not been examined, before the county court, or dispensed with the examination, by his assent, entered of record, to the circuit court, in such proper manner, as to show to the court, by the record, that the circuit court passed upon the subject, and denied and refused to allow the defendant his right of examination, if such he is entitled to.

For these reasons there is no error in the judgment of the court below, and the judgment of the circuit court of Kanawha county rendered in this cause on the 6th day of November, 1873, upon the verdict of the jury, against the said James Stewart, must be affirmed.

The other Judges concurred.

JUDGMENT AFFIRMED.

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## ADMINISTRATORS—APPOINTMENT OF, IN PLACE OF THOSE APPOINTED UNDER CONFEDERATE AUTHORITY, THEIR POWERS, &c.

4. J. Marcus Alderson, who resided in the county of Greenbrier, in the State of West Virginia, died, in said county, in the year 1863, prior

to the 26th day of October, 1863, intestate. The State of West Virginia was formed out of the State of Virginia, after the commencement of the late civil war, and the government of West Virginia was organized and went into operation at the city of Wheeling, under a Constitution, on the 20th day of June, 1863. At the commencement of said war the government of Virginia, at Richmond, the capital of the State of Virginia, adhered to, and aided the late Confederate Government, (so called) in said war with the United States. About the commencement of said war a part of the people of the State of Virginia, organized a government for the State of Virginia, at the city of Wheeling, called the Restored Government of Virginia, which Government was recognized by the Government of the United States, as the lawful Government of the State of Virginia, throughout the war. In the State of Virginia, before, and during, the war, there was held in each county, a county court, with power to appoint administrators, and to revoke the appointment of such fiduciaries, in certain cases. County courts were unauthorized by the constitution and laws of West Virginia, and by the laws of West Virginia the Recorder, alone, of each county, was authorized to appoint administrators. The restored Government of Virginia, and the Government of West Virginia, was never organized in Greenbrier county, during said war, but said county was held by the military forces of the Confederate Government, and of the government of Virginia, at Richmond, during all that time. And during the war the said county court held its sessions in said county, and appointed administrators, &c. On the 26th day of October, 1863, after the organization of the government of West Virginia, at Wheeling, and contrary to the laws thereof, the said county court of Greenbrier county appointed Malinda S. Alderson, administratrix of said J. Marcus Alderson, deceased. Afterwards, and after the end of the war, and on the 16th of December, 1863, William Robinson was appointed administrator of the estate of said Alderson, deceased, by the Recorder of said county. Afterwards C. brought an action of debt in the circuit court of said county, against said Robinson (as administrator) to recover a debt claimed to be due

from his intestate. Robinson filed a plea in said action of non-administrator, to which a general replication was filed and issue joined.—HELD:

That Robinson was, after his appointment, the proper administrator of said decedent Alderson, and that he was properly sued as such, and that although the acts of said Malinda S. Alderson, as administratrix of said Alderson, prior to the laws of West Virginia being extended over and enforced in the said county, and the appointment of said Robinson as administrator, will be recognized as valid generally—still whatever authority she may have had as administratrix, as aforesaid, ceased on the appointment of said Robinson, as administrator, if not before, although she had no notice of such appointment.

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**AGENTS AND AGENCY.**

1. An agency may be created by express words or acts of the principal, or it may be implied from his conduct and acquiescence. The nature and

extent of an agency may be implied and inferred from circumstances. A common mode of appointment of an agent is by a written request, or by implication from the recognition of the principal, or from his acquiescence.

*Ruffner, Donnelly & Co. v. Hewitt, Kercheval & Co.,* 535

2. Generally, it is the right of an agent to be reimbursed all his advances, expenses, and disbursements, made in the course of his agency, on account of or for the benefit of his principal, when the advances, expenses and disbursements have been properly incurred and reasonably and in good faith paid, without any default on the part of the agent.

*Idem,* 535

3. If an agent has, without his own default, incurred losses or damages in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation.

*Idem,* 535

4. It is, ordinarily, the duty of an agent where the business in which he is employed admits of it, or requires it, to keep an account of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts; and render such accounts to his principal at all reasonable times, without any suppression, concealment or overcharge.

*Idem,* 535

5. If the agent unnecessarily exceeds his commission, or risks the property of his principal, he thereby renders himself responsible to his principal, for all losses and damage, which are the natural consequences of his act.

*Idem,* 535

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1. A judgment having been entered for a larger amount than the facts agreed warranted, and, subsequently, on motion of the plaintiff, in whose favor the error was committed, and without notice, the error was corrected; the defendants, for whose benefit the correction was made, cannot, for that reason, appeal or obtain a reversal of the judgment.

*Farmers' Bank v. Willis*, 31

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#### APPELLATE COURT.

1. When "The Farmers' Bank of Virginia," by that name, brought suit, and the defendants made no objection, on that account, but pleaded in bar, and agreed the facts, using that name, and the "President, Directors and Company of the Farmers' Bank of Virginia," indiscriminately, as the name of the same corporation, and submitted the case to the court, which gave judgment in favor of the Bank; the defendants, who appealed, cannot, in this Court object, successfully, to the name in which the suit was brought.

*Farmers' Bank v. Willis*, 31

2. The 7th section of chapter 16, of the acts of the Legislature of West Virginia, 1872-3, entitled "An act organizing the Supreme Court of Appeals, defining its jurisdiction and powers, and prescribing its manner of proceeding," does not apply, in whole, or any part thereof, to a case of prohibition, commenced in the Supreme Court of Appeals.

*Buskirk v. Judge of Circuit Court*, 91

3. When the court erroneously makes an order that unless a person who is not a party to the bill, is so made, within thirty days from the date of the order, by amended bill, that the plaintiff's bill

should stand dismissed, with costs to the defendants, without prejudice to any other suit, &c.; and the plaintiffs failed to make such party a defendant by amended bill, or otherwise, within the thirty days or afterwards. And the defendants afterwards, and after the thirty days had expired and before any other action was taken in the cause by the court, or any of the parties appeared in court and asked and obtained leave of the court, without objection, to file a cross bill in the cause against the plaintiffs in the original bill, and, in pursuance of such leave, did file such cross bill, to which the defendants filed their answers and plaintiffs and defendants afterwards took and filed the depositions of various witnesses in support of their pretensions in the original cause, and various orders and decrees were afterwards made by the court in the proceedings, on both the original and cross bills, including the decree adjudicating the principles of both causes from which the appeal is taken as though said order of conditional dismissal had never been made, without objection being made or taken, by the court or any of the parties to the cause, proceeding further in the cause, at any time, after the expiration of the said thirty days: It is too late for the appellants, who were defendants below, to be heard in the appellate court, to object that the original cause at and after the expiration of the thirty days from the date of said order of conditional dismissal become, and was, dismissed by virtue of such order, and that all subsequent proceedings of the court in the causes, were, in consequence thereof, irregular and inoperative or void. In such case the appellate court will ordinarily consider that the causes were proceeded with by the court by consent of parties.

*Hirschman, Admr. v. Ballard, Admr.*, 152

4. If, in the case above stated, the person so directed to be made a party to the original cause, was a necessary and proper party thereto, under the circumstances above stated, the appellate court will not reverse and set aside the decree of the court below adjudicating the principles of the cause, because of such conditional order of dismissal and give full effect thereto; but in such case the appellate court will ordinarily reverse the decree appealed from, and direct such person to be made a party, and the cause to be proceeded with, as though such conditional order of dismissal had never been made.

*Idem*, 152

5. When a demurrer is filed to a bill and the court proceeds to adjudicate, and does adjudicate, the principles of the cause, in favor of the plaintiff, without first acting *pro forma* upon the demurrer, it will be considered that the court in rendering the decree adjudicating the principles of the cause considered the sufficiency of the bill,

and substantially overruled the demurrer thereto, and this Court will not reverse the decree adjudicating the principles of the cause, for this cause alone.

*Idem*, 152

6 Where the record does not show when an amended bill or an answer is filed, yet if the decree shows the court proceeded to hear the cause upon the amended bill and answer, the appellate court will consider them properly filed.

*Henderson & Co. v. Alderson*, 217

7. Notwithstanding the act of the Legislature approved the 21st day of December, 1872, entitled "an act regulating appeals, writs of error and *superseatas*," does not allow an appeal from an order of a judge of a circuit court granting an injunction, an appeal from such an order, pending in the Supreme Court of Appeals of this State, on the 31st day of December, 1872, and the first day of January, 1873, and not heretofore decided, is still pending in this Court, and it still has power and jurisdiction to hear and determine the same upon its merits or otherwise, as may be proper, under the provisions of the twelfth, seventeenth and twenty-first sections of the Schedule to the Constitution of this State, and the act of the Legislature, approved January 11, 1873, entitled "An act organizing the Supreme Court of Appeals, defining its jurisdiction and powers, and prescribing its manner of proceeding," and especially under the provisions of the fourth section of the latter act.

*McMillan v. Ferrell*, 223

8. When several instructions are asked and refused, and a general exception is taken to the refusal, if all the instructions are proper and should have been given, the exception is sufficient and the judgment will be reversed.

*Ocheltree v. McClung*, 232

9. When on motion of the defendants, the judgment entered at rules, in the clerk's office, is set aside, and leave given the defendants to file a special plea in thirty days, an appellate court will presume, where no bill of exceptions has been filed, that such order was made by consent or acquiescence of the plaintiffs

*Williams, Admr. v. Knights*, 335

10. The record not disclosing with certainty whether special pleas were filed, or if filed, showing that no replications were filed thereto, and no issue joined thereon, it was error to try the cause, and the judgment entered upon the verdict must be reversed.

*Idem*, 335

11. Where an instruction is given to the jury by the court, at the instance of the plaintiff, which does not correctly propound the law, but it is manifest from the record, that the defendant could not, thereby, have been prejudiced or in-

jured, the appellate court will not reverse the judgment of the court below on account of such instruction.

*Clay v. Robinson, Admr.*, 348

12. When, apparently, two defendants, by counsel, petition for an appeal, which is allowed, and so appear and prosecute the appeal, though, on the hearing evidence is found in the case, tending to show that one was dead before the decree appealed from was rendered, yet, in this Court, it appearing that the decree is erroneous, and the other appellant having the right to prosecute the appeal and have the decree reversed as to both, the Court will not, of its own motion, institute an inquiry to ascertain whether the party be living; but will treat him as before the Court, by counsel, and reverse the decree, with costs to both appellants.

*Rittenhouse v. Harman*, 380

13. See Continuances, and

*Davis & Moore v. Walker*, 447

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*Warren and Wife v. Syme*, 474

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*Dickinson, Exor., v. Lewis*, 673

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*Hinchman, Admr., v. Ballard, Admr.*, 152

#### ARBITRATION AND AWARD.

1. Three persons are chosen by the vendor and vendee of land to ascertain and fix the value of the land, and to certify such valuation; in such case the certificate of valuation cannot be considered as more solemn, conclusive or binding upon the parties than an award—it is but an award, and the referees, or persons chosen, cannot,

upon principle, be considered otherwise than arbitrators.

*Dickinson v. Railroad Co.*, 390

2. It is, ordinarily, in equity, though perhaps not universally, misconduct in arbitrators chosen out of court to determine and award, as to the matter or matters referred to them, in the absence of either party in interest to the submission, his agent or attorney, without notice being previously given to such absent party, his agent or attorney, of the time and place of their proceeding to hear and determine the matter submitted, unless such absent party, not having notice, has dispensed with or waived such notice, or the like; and for such misconduct a court of equity may, ordinarily, set aside the award, at the instance of either party materially interested, not having such notice, who was absent.

*Idem*, 390

3. An award procured by fraud and imposition of one of the parties to the submission, will be set aside for that cause, by a court of equity, in a proper case.

*Idem*, 390

4. Though the simple fact that one of the parties to the submission wrote the award, in the absence of the other, who was not notified of the time and place of the arbitrators proceeding to make their award, may not, of itself, be sufficient to invalidate the award, still it may be considered, unexplained, as affording just ground for suspicion and criticism. But where such party, in such case, wrote the award, and so wrote it that it is materially erroneous and deceptive, in his favor, and the arbitrators did sign it, as written, a court of equity may set aside the award.

*Idem*, 390

5. When the value of property in money is referred to arbitrators and they fairly execute the submission, generally, the award cannot be set aside or determined to be invalid upon the ground that the valuation is exorbitant.

*Idem*, 390

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*White v. Heavner, Sheriff, &c.*, 324

ATTACHMENTS—AFFIDAVIT FOR UNDER STATUTE, AND SUFFICIENCY OF SAME.

1. Under the act of the Legislature on the subject of attachments, passed in 1867, an affidavit that the affiant "thinks" the plaintiff ought to recover the sum claimed, is not equivalent to an affidavit that he "believes" he ought to recover such sum; and is not sufficient to authorize an attachment.

*Rittenhouse v. Harman*, 380

2. See Foreign Attachments in Equity Nos. 1 and 2, and

*King v. Board*, 701

ATTACHMENTS—HOW SAME, AND LIEN OF, AFFECTED BY SUBSEQUENT PROCEEDINGS IN BANKRUPTCY.

See Bankruptcy Nos. 2, 3, 4, 5 and 6, and

*Mason & Hoge v. Warthens*, 532

ATTACHMENTS OF REAL PROPERTY IN SUITS IN EQUITY—WHEN NOT DISSOLVED BY DEATH OF DEBTOR.

The death of a debtor whose real property in this State has been attached in a suit in equity, and proceedings therein by attachment against him and his estate as a non-resident, does not dissolve the attachment or lien thereon, where the death occurs after the attachment is levied.

*White v. Heavner, Sheriff, &c.*, 324

ATTESTATION OF COPIES OF RECORDS OF COUNTY COURTS IN VIRGINIA.

See Evidence Nos. 4 and 5, and

*Hinchman, Admr. v. Ballard, Admr.* 152

ATTORNEY AT LAW.

See Measure of Recovery, and

*Poley & Son v. Anderson*, 202

BANKS.

As to Assignments and Trust Deeds by Banks by virtue of Statute and effect of,  
See Payments No. 1, and

Farmers' Bank of Virginia Nos. 2 and 3.

BANKRUPTCY.

1. See Deeds No. 29, and

*Warren and Wife v. Syme*, 474

2. The twenty-first section of the Bankrupt Act, of 1867, so far as the stay is concerned, applies to personal final judgments against the debtor, and not to judgments against the property attached, or the proceeds of the sale thereof, when the attachment lien accrued prior to the filing of the petition in bankruptcy.

*Mason & Hoge v. Warthens*, 532

3. An attachment lien, acquired regularly, without the procurement or sufferance of an insolvent debtor, to give preference to the attaching creditor over other creditors, will not be displaced by virtue of the thirty-fifth or thirty-ninth sections, by subsequent proceedings in bankruptcy, though commenced within four months after the levy of the attachment.

*Idem*, 532

4. Under said sections something more than passive non-resistance in an insolvent debtor is neces-



sary to invalidate an attachment lien on his property, when the debt is due and he has no defence.

*Idem*, 532

5. In such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the attachment and levy thereof, and a failure to do so is not sufficient evidence of an intent to give preference to the attaching creditor or to defeat the operation of the Bankrupt Law.

*Idem*, 532

6. Though the attaching creditor, in such case, may know the insolvent condition of the debtor, his attachment and levy upon his property are not, therefore, void, and are no violation of the Bankrupt Law.

*Idem*, 532

#### BANKRUPT ACT.

See Bankruptcy Nos. 2 to 6 inclusive, and  
*Mason & Hoge v. Warthens*, 532

**BARGAIN AND SALE, DEED OF, ADEQUATE TO VEST WHAT ESTATE IN ONE PERSON, AND AFTERWARDS DIVEST OUT OF THAT PERSON AND VEST IN ANOTHER PERSON.**

See Deeds No. 6, and  
*Ocheltree v. McClung*, 282

#### BELLIGERENT RIGHTS.

1. Belligerent rights having been conceded by the National Government to the Confederates in the late civil war, it is the duty of the Judiciary of this State to recognize the same principle, in actions against belligerents for acts done in conformity with military authority and under a military order.

2. See Pleadings at Law Nos. 1, 2, 3 and 4, and  
*Carskadon v. Williams*, 1

3. See *Caperton v. Martin*, and other cases in previous volumes of the W. Va. Reports, where a contrary doctrine seems to have been held.

#### BEQUESTS.

1. The will of M. C., who lived and died in Berkeley county, Virginia, in 1854, and which will was admitted to probate in said county, in 1855, contained this clause, viz:

*First.* I have subscribed \$2,000 towards the founding of an academy in or near the town of Martinsburg, to be under the control and direction of the Presbytery of Winchester, (O'd School), which, if not sooner paid by me, I hereby direct my executor, first of all, to pay out of the proceeds of the aforesaid land (referring to land in Pennsylvania), as soon as the same shall come into his hands, to such person or persons, as the said Presbytery may authorize to receive the same the sum of \$2,000.

*Second.* I give to the trustees of the Presbyterian Congregation at Martinsburg (Old School) the

sum of \$3,000, to be applied by them towards the purchase of a lot, and the erection thereon of a house, or the purchase of a house and lot and fitting the same for the residence of the pastor of the said Congregation.

*Third.* To the Trustees of the Board of Foreign Missions of the Presbyterian Church in the United States of America, the sum of \$500, to be applied to the uses and purposes of said Board and under its direction.

*Fourth.* To the Trustees of the Board of Missions of the General Assembly of the Presbyterian Church in the United States of America, towards the fund for superannuated ministers and their families, the sum of \$500.

*Fifth.* To the Trustees of the Board of Missions of the General Assembly of the Presbyterian Church in the United States, the sum of \$500

*Sixth.* To the American Bible Society, formed in New York in the year 1816, I give the sum of \$500, to be applied to the charitable uses and purposes of said Society.—HELD:

That the foregoing bequests are void, under the statutes of Virginia, and the decisions of her courts.

*Bible Society v. Pendleton, Trustee*, 79

2. See Conflict of Laws.

#### BILL IN CHANCERY.

1. See Injunctions No. 2, and

*Reed v. Patterson*, 263

2. See Injunctions Nos. 5, 6 and 7, and

*McClung v. Levisay*, 329

3. See Demurrer in Proceedings in Chancery, No. 2, and

*Rittenhouse v. Harman*, 380

4. See Practice in Chancery, No. 11, and

*Dickinson v. Railroad Co.*, 390

5. See Practice in Chancery No. 20, and

*Warren and Wife v. Syme*, 474

6. See Practice in Chancery No. 23, and

*Brown v. Knapp*, 678

7. See Injunctions, Nos. 10 and 11, and

*Lewis v. Spencer*, 689

8. See Bill of Discovery, and

*Jones v. Cunningham*, 707

#### BILL OF DISCOVERY.

When the plaintiff, by bill of discovery, seeks a discovery from the defendant as to any matter of fact, the answer is evidence for the defendant, so far as it is responsive to such bill, as to the fact as to which the discovery is sought; yet as to matter in respect to which no discovery is sought, if the answer alleges anything affirmatively, it is not evidence for the defendant, but it is to be proved by him.

*Jones v. Cunningham*, 707

BILL OF EXCEPTIONS.

Rule as to same in Court of Appeals where evidence certified and not the facts proved.

*Henry v. Davis*, 715

CASES DISAPPROVED OR DISTINGUISHED

*Mundy v. Vawter*, 3 Gratt. 518, in  
*Warren and Wife v. Syme*, 474

*Shutte v. Thompson*, 15 Wall. 151, in  
*Forqueran v. Donnelly*, 114

*Gill and Simpson v. Fauntleroy's Heirs*, 8 R. Mon. 177, in

*Leftwich v. Neal*, 575

CERTAINTY IN A DEED—HOW DETERMINED.

See Deeds No. 25, and  
*Warren and Wife v. Syme*, 474

CERTIFICATE OF VALUATION.

See Arbitration and Awards No. 1, and  
*Dickinson v. Railroad Co.*, 390

CERTIFICATE OF ADMINISTRATION OF OATH—WHAT SUFFICIENT UNDER CODE OF VIRGINIA, 1860.

See Affidavit No. 3, and  
*Parker v. Clark*, 467

CHECKS—CERTIFYING OF BY NATIONAL BANKS.

See National Banks No. 1, and  
*National Bank v. National Bank*, 544

CHECKS—CONDITIONAL ACCEPTANCE OF BY NATIONAL BANK—WHEN.

See National Banks No. 1, and  
*National Bank v. National Bank*, 514

CLERK OF COURT—HIS DUTY—WHAT CONSIDERED PART OF RECORD IN A CASE AND WHO DECIDES WHAT IS THE RECORD.

The clerk of a court, under the supervision of the court, must ascertain the papers filed in a case or referred to in the order book, as a part of the record: Though where the papers are identified, whether they may be considered as properly a part of the record, the court alone decides.

*Warren and Wife v. Syme*, 474

COMMISSIONERS TO MAKE SALE OF LANDS UNDER DECREE OF COURT—WHEN THEY SHOULD BE REQUIRED TO GIVE SECURITY AND HOW.

See Practice in Chancery No. 17, and  
*Eaker v. Oil Tract Co.*, 454

COMMITTEES OF LUNATICS—THEIR POWERS AND DUTIES.

See Estates of Lunatics Nos. 1, 2, 3, 4 and 5, and  
*Hinchman, Admr. v. Ballard, Admr.*, 152

COMMON CARRIERS.

A common carrier will not be liable for injury to a horse occasioned by the improper or unwarrantable interference of the plaintiff or his agent with the management of the car, by the servants or employees of the company.

*Roderick v. Railroad Company*, 54

COMPLIANCE WITH CONDITIONS IN CONTRACTS.

1. See Conditional Contracts No. 1, and  
*Pitzer, Admr. v. Burns*, 63
2. See Measure of Recovery, and  
*Polsley & Son v. Anderson*, 202

COMPROMISES BY COMMITTEES OF LUNATICS.

See Estates of Lunatics Nos. 1, 2, 4, 5, 6 and 7, and  
*Hinchman, Admr. v. Ballard, Admr.*, 152

CONDEMNATION OF LANDS.

1. A report of commissioners, made under section fourteen of chapter forty-two of the Code, providing that the party defendant shall have the liberty of constructing certain easements over the land taken by the Company, is erroneous upon its face, although otherwise in conformity to the statute, and may be set aside on motion of the defendant.

*Railroad Company v. Halstead*, 301

2. See Taking Land for Purposes of Public Utility, by Corporations, and

*Salt Company v. Brown*, 191

3. Commissioners appointed by a circuit court, under the eleventh section of the forty-second chapter of the Code of West Virginia to ascertain the value of the land proposed to be taken by a railroad company for the purposes of its road and damages to the residue of the tract, &c., ascertain the actual value of the land, at the time when taken, without reference to any enhanced value given thereto and common to other land owners along the line of the road by reason of the prospective construction of the railroad company's road through the land, such value, so ascertained, is a just compensation for the land, to the land owner, within the meaning of the Constitution.

*Railroad Co. v. Tyree*, 693

CONDITIONAL CONTRACTS.

1. B., on the 26th day of September, 1845, executed a deed of trust conveying to C. land in trust, to secure the payment of a debt of \$300, with in-

terest from the date aforesaid, to F., and other debts to other persons. The deed of trust provides that if the debts therein named are not paid within one year, that the trustee shall sell the land at public auction to pay the debt. On the same day the deed of trust was executed, F. executed to B. a writing, in these words: "It is hereby understood and agreed that if I do not succeed in clearing B. of either of the suits now pending in the circuit court of law of Berkeley county by H., assignee of W. G. B., then the note embraced in a trust deed of this date, to be void and of no account: if I succeed in clearing him of but one of the two cases, it is void as to all but \$150, or the one half.

September 26, 1845.

F."

F. was at the time the counsel and attorney of B., to defend said pending suits, in the writing mentioned.—**Held:**

That to read said writing with the acknowledgment of debt to F. contained in the deed of trust and give it the most liberal construction, it can only have the effect to make the debt of F. conditional, and a substantial compliance with the condition, by F. is sufficient, in equity, and the debt then became payable and F. entitled to enforce the deed of trust, in equity, for the payment of his debt and interest.

*Pitzer, Admr. v. Burns,* 63  
2. See Measure of Damages, and

*Polsley & Son v. Anderson,* 202

3. See Contracts Nos. 1 and 2, and

*Strauss v. Railroad Company,* 368

4. See *Lial v. Wheeling,* 501

#### CONDITIONAL ORDER OF DISMISSAL.

See Appellate Court Nos. 3 and 4, and  
*Hinchman, Admr. v. Ballard, Admr.,* 152

#### CONFEDERATE ADMINISTRATORS—WHEN THEIR POWERS CEASE.

See Administrators, Appointment of, in place of those appointed under Confederate authority—their Powers, &c., No. 1, and

*Clay v. Robinson, Admr.,* 348

#### CONFEDERATE CONSIDERATION.

1. See Deeds No. 2, and

*Henderson & Co. v. Alderson,* 217

2. See Confederate Money, No. 1, and  
*Jameson v. Myles' Exor.,* 311

3. See Confederate Money No. 2, and  
*Brightwell, Trustee v. Hoover,* 342

#### CONFEDERATE CONTRACTS.

1. See Deeds No. 2, and

*Henderson & Co. v. Alderson,* 217

2. See Confederate Money, No. 1, and  
*Jameson v. Myles' Exor.,* 311

3. See Confederate Money, No. 2, and  
*Brightwell, Trustee, v. Hoover,* 342

#### CONFEDERATE MONEY.

1. M. deceased, in his lifetime and at his death, was the owner of personal and real property, in Greenbrier county, in this State; and at his death he was indebted in an amount so large that it was doubtful whether his real and personal estate were, together, sufficient to pay his debts. Sometime prior to his death he made and published his will, in due form; which was, after his death, in the year 1867, duly proven by the subscribing witnesses and admitted to record in said county. The first, second, third and fifth clauses are in these words, viz:

*First,* I direct that Richard H. Gillilan be my executor until my oldest son, Aquilla Myles, becomes twenty-one years of age, then I direct that he be associated with said Gillilan, and that they jointly act in the management of my affairs.

*Second,* I direct that my business be carried on in the same manner that it would be, provided I were living, by my executors, for the term of eight years after my decease; that my sons all remain and work together until that time, in order that they may pay all the debts against my estate, with the understanding that each receive, in the division to be hereafter named, a fair compensation for their labor, from the time they are twenty-one years of age up to the expiration of the eight years above named. My daughter Emily Myles, to remain in the family, as one of the same, until the expiration of the time above mentioned, provided she does not marry, but to receive no compensation for her services other than her sustenance.

*Third,* I empower my executor or executors, to collect all money due me and apply to the payment of my just debts; and should my creditors be not willing to wait until the money can be made and collected, I direct my executor or executors, to give a lien on my lands, or so much thereof as may be necessary, in order to prevent suit being brought on my debts and costs added thereto. If my creditors will not wait, I direct that so much of my lands be sold as may be required to satisfy the same.

*Fifth.* At the expiration of the eight years above named, I direct that my property, of all kinds, be divided equally among my daughter and all my sons, taking into consideration the wages due those who have arrived at twenty-one years of age previous to this time, as above provided for; hereby revoking all other wills and decrees by me made.

Gillilan qualified as executor, at the time the will was admitted to probate. Afterwards, in the year 1868, and before G. had made any settlement of his executorial account, J. filed his bill in

the circuit court of Greenbrier county, claiming that he was the owner, by assignment, of two bonds executed by M., the 6th day of December, 1859, to C., and payable on demand, for \$500 and \$492, respectively, which were still due and unpaid; but he does not make an exhibit of the assignment or prove it, or expressly allege who assigned the bonds to him; and alleging that it was doubtful if the real and personal estate of M., were together sufficient to pay his debts: And praying that the executorial account of G. be settled, and that the creditors of M. be convened before a commissioner of the court and that their debts be ascertained and reported. The executor and children of M. were the only party defendants to the bill, some of whom were infants. Afterwards, the cause was, by decree regularly made, referred to commissioners, for the purposes prayed in the bill. While the cause was before the commissioner, K. appeared before him and claimed that the estate of M. was indebted to him in the sum of \$6,000, and that the same constituted a lien, for its payment, first in priority, upon a certain tract of land of decedent; and the commissioner, from the evidence before him, reports these facts in relation to said claim, viz: "Some of the creditors of Myles insisting on the payment of the debts, and the executor having no funds to meet the demands he did, on the 29th day of March, 1862, borrow of K. \$4,140, of which about \$690 was in bank notes and the remainder in Confederate money. He also took up a bond executed to Joseph Myles to K. on the 15th day of March, 1861, for \$1,750.00, which, with the interest thereon and the money borrowed, amounted, on the 29th of March 1862, to the sum of \$6,000, for which said G. executed to K. his bond as executor of M. G., executor, to secure the payment of his bond, executed a trust deed upon a tract of land belonging to the estate, situated on Anthony's creek, he understanding himself to be authorized so to do by the will." "The Confederate money was worth at the time seventy-seven cents in gold per dollar." It is proved that the executor applied the whole of the money borrowed of K. to the payment and extinguishment of certain of the debts of M., and that the debts of M. were thereby extinguished to the amount of the money so borrowed.—**Held:** That, under the circumstances, it is proper and just that K. should be allowed, as against the estate of M., his original debt of \$1,750.00, \$600 for the bank notes, with their interest, and at least the gold value of the Confederate money at the time it was loaned.

*Jameson v. Myles' Exor.*, 311

2. A party seeking to enforce a lien for the payment of purchase money, on a contract of sale made between the 1st day of May, 1861, and the

1st day of May, 1865, said money to be paid in Confederate States Treasury notes, or Virginia treasury notes, is entitled to the value of the same, to be ascertained under the act of the Legislature, passed on the 17th day of April, 1873, being chapter 118, and entitled "an act providing for the adjustment of certain liabilities arising under contracts made between the 1st day of May, 1861, and the 1st of May, 1865.

*Brightwell, Trustee, v. Hoover*, 342

# CONFIRMATION OF REPORT OF COMMISSIONER IN CHANCERY—WHEN ERROR TO DO SO.

See Practice in Chancery No. 7, and

*Jameson v. Myles' Exor.*, 311

## CONFLICT OF LAWS.

M. C., living in Virginia, makes a deed conveying land in Pennsylvania to P., to be sold, and directing that the proceeds of said sale be held by the grantee, subject (in substance) to the written order of the grantor; M. C. subsequently makes a will disposing of the proceeds of said land, which will is admitted to probate in Virginia, in 1855.—**Held:**

That the validity of any bequest of said proceeds must be determined by the laws of Virginia in force when the will took effect.

*Bible Society v. Pendleton, Trustee*, 79

## CONSIGNOR AND CONSIGNEE.

See Account of Sales, and

*Ruffner, Donnelly & Co. v. Hewitt, Kercheval & Co.*, 585

## CONSPIRACY, PROOF OF, &c.

See Evidence Nos. 2 and 3, and

*Carskadon v. Williams*, 1

## CONSTITUTION OF 1863.

Section 9, article 3 of Constitution of 1863, construed in Constitutional Law Nos. 20 and 21, and

*Rucker v. Superiors*, 661

## CONSTITUTION OF 1872.

Section, 8, article, 10, construed and applied to a case in Constitutional Law Nos. 9, 12 and 13, and

*Liat v. Wheeling*, 501

Section 3, article 11, construed and applied to a case in Constitutional Law No. 11 and

*Liat v. Wheeling*, 501

## CONSTITUTIONAL LAW.

1. See Taking Land for Purposes of Public Utility, by Corporations, and

*Salt Company v. Brown*, 191

2. In a suit at law in which an attachment was sued out and levied on property of the defendants and judgment obtained therein against the defendants, on publication, a part of the defendants appeared in the court in which the judgment was rendered within five years from the rendition of the judgment, and tendered to the court their petition praying for a rehearing of the proceedings in the action without accompanying the petition with the affidavit prescribed and required in such cases by the act of the Legislature passed the 11th day of February, 1865, entitled, "An act to amend and re-enact sections twenty-three, twenty-seven and twenty-eight, of chapter one hundred and fifty-one and section thirteen of chapter one hundred and seventy of the Code of Virginia," and also by the twenty-seventh section of chapter one hundred and six of the Code of West Virginia, which affidavit so prescribed is commonly known and called "The Suitors' Test Oath." The court refused to receive and allow the petition to be filed.—HELD:

That it was error in the circuit court to refuse to allow said petition to be filed, on the ground that it was not accompanied by such affidavit, or test oath.

*Ross v. Jenkins,* 234

3. So much of the said act of the Legislature, and section twenty-seven of chapter one hundred and six of the Code of West Virginia, as prescribe such affidavit or test oath, are contrary to the Constitution of the United States and to the Constitution of the State of West Virginia, and were, therefore, null and void from their passage.

*Idem,* 284

4. The petition in the case is sufficient and should now be received by the court below and ordered to be filed and further to proceed in the same, as justice requires and the law directs.

*Idem,* 284

5. See Condemnation of Lands No. 1, and

*Railroad Company v. Halstead,* 301

6. By an act of the Legislature, passed the 13th day of February, 1871, entitled "an act to authorize the City of Wheeling to subscribe to the capital stock of the Wheeling and Lake Erie Railroad Company," the council of the city of Wheeling were authorized to subscribe, in the name of the city, to the capital stock of said Company, to an amount not exceeding \$300,000, and pay the same in bonds of the city, *provided*, that not less than three-fifths of the voters of the city, who voted on the question, were in favor of the same. By an act of the Legislature, passed February 15, 1872, entitled "an act to incorporate the Wheeling and Ohio Union Railroad Company," and the 13th section thereof, the council of said city was authorized to subscribe, in the name and on behalf of the city, to the capital of said company, to an

amount not exceeding \$300,000, and might pay the subscription in the bonds of the city, or otherwise, *provided*, three-fifths of the voters of said city voting on the question, voted for the subscription. Each of said acts authorized the council of the city to submit to the voters, by an election, the question of the subscriptions. The council, by two separate ordinances, submitted the people the question of \$300,000 subscription, under each act, the election to take place on the 1st of June, 1872. On that day, the election was duly held, three-fifths of the voters of the city, voting at the election, voted for each subscription. Afterwards, on the 22d day of August, 1872, the people of the State adopted a new Constitution, which took effect on that day, by express provision of the Schedule thereto. The eighth section (of the tenth article of the Constitution, so adopted, is in these words, viz: "No county, city, school district, or municipal corporation, except in cases where such corporation have already authorized their bonds to be issued shall hereafter be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof, within not exceeding 34 years; *provided*, that no debt shall be contracted under this section, unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for or against the same." After the adoption of the new Constitution, and after it had taken effect, and on the 20th day of January, 1873, the council of the city, by two separate ordinances, appointed three commissioners (the same in each case) to subscribe to the stock of each of said companies, the said sum of \$300,000, to be paid in the bonds of the city, and directing when such bonds should be paid by said commissioners. In such case the bonds to be payable in the city of New York, bearing seven per cent. interest, payable semi-annually, and the principal payable in 30 years. The council failed to provide for a direct annual tax sufficient to pay, annually, the interest on the debt to be created by such subscription, or any part thereof. It is admitted that the subscription of both said sums of \$300,000, or either of them, would increase the debt of the city beyond the limit prescribed the said eighth section of the tenth article of the Constitution. The making of each of said subscriptions were, by the council, made subject to conditions. Before either of

the subscriptions to the stock of said companies, were made, H. K. L., and others, resident voters, owners of property and tax-payers of the city, who sued in their own behalf as well as all other tax-payers of the city, except the defendants, filed in the circuit court of the county of Ohio, their bill of injunction against the said city, the council and commissioners, enjoining and restraining them from subscribing to the stock of said companies, or either of them, the amounts aforesaid, payable in the bonds of the city, or any part thereof, or to contract a debt therefor, or any part thereof.—HOLD:

That the provisions of said acts of the Legislature, authorizing the council of the city to subscribe stock to each of said companies, conferred a power upon a public corporation of government which could be modified, changed, enlarged, restrained or repealed by the Constitution—the said acts, in neither case, importing a contract, within the meaning of the clause of the Constitution of the United States, prohibiting a state from passing a law impairing the obligation of contracts.

*List v. Wheeling,* 501

7. The ordinances submitting said subscriptions to the vote of the voters, and the mere vote of the prescribed number of voters for the subscription, did not, in and of themselves, together, or separately, form such a contract with the railroad companies, as would be protected by the tenth section of the first article of the Constitution of the United States. Until the subscriptions were each made, the contract, in each case, was unexecuted.

*Idem,* 501

8. The said eighth section of the tenth article of the Constitution of the State is not addressed alone to the Legislature, but is addressed to the several counties, cities, &c., and all other departments and persons in the State, and took effect and became binding and operative, so far as it is prohibitory and restrictive in its provisions, upon counties, cities, &c., on and from the 22d day of August, 1872, and the action of the council of the city in appointing commissioners to make said subscriptions, payable in the bonds of the city, was, under the circumstances without authority of law, and for said subscriptions to be made for said amounts and a debt be thereby created therefor, or for any part thereof, payable in the bonds of the city, would be in violation of the said eighth section of the tenth article of the Constitution of the State.

*Idem,* 501

9. Equity, in such case, has jurisdiction to perpetually enjoin the making of the subscriptions and the issuing of the bonds of the city.

*Idem,* 501

10. The third section of the eleventh article of the State Constitution does not qualify or suspend the operation of said eighth section of the tenth article thereof.

*Idem,* 501

11. The final decree, perpetuating the injunction, whereby the court orders and decrees "that the defendants, and each of them be, and they, and each of them, are, hereby, enjoined and restrained from contracting the debts and issuing the bonds in the bill of complainants mentioned, or either of them, or any part thereof," should be construed to apply only to the ordinances of the council of the city authorizing the subscriptions to be made to the stock of said companies, and the making of the subscriptions for the said amounts, or any part thereof, and payment thereof, or any part thereof, in the bonds of the city, and the making of subscriptions to the stock of said companies, or either of them, for the said amounts, or any part thereof, in such manner as to create a debt against the city under and according to said ordinances, or either of them. That the said perpetual injunction does not prohibit the city of Wheeling, or its council, from hereafter contracting any such debt, and issuing the bonds of the city therefor, when done according to the provisions and within the limits, restrictions and requirements of said eighth section of the tenth article of the Constitution, and any act of the Legislature that may then be in force, not in conflict with, or contrariant to, said section and article.

*Idem,* 501

12. The said eighth section of the tenth article of the Constitution was not intended to, and does not in anywise, interfere with, or prevent, the levying, collecting and expenditure, annually, by authority of law, by the proper legal authorities of the several counties, cities, &c., taxes for county, city, &c., purposes, and to do and cause to be done, whatever is necessary or proper for that purpose, including the making, or causing to be made, contracts touching the expenditure of the taxes so levied and collected annually, and the like—And all this without a vote being taken, under the eighth section of said tenth article of the Constitution.

*Idem,* 501

13. In a suit at law, in which an attachment was sued out and levied on property of the defendants and judgment obtained therein against the defendants, on publication, one of the defendants appeared in the court in which the judgment was rendered, within five years from the rendition of the judgment, and tendered to the court his petition, praying for a re-hearing of the proceedings in the action, without accompanying the petition with the affidavit prescribed

and required in such case by the act of the Legislature passed the 11th of February, 1865, entitled "An act to amend and re-enact sections twenty-three, twenty-seven and twenty-eight of chapter one hundred and fifty-one, and section thirteen of chapter one hundred and seventy of the Code of Virginia;" which affidavit, so prescribed, is commonly known and called "The Sultors' Test Oath." The court rejected the said petition and refused to allow it to be filed.—**Held:**

That it was error in the circuit court to reject and refuse said petition on the ground that it was not accompanied by such affidavit or test oath.

*Lynch v. Hoffman,* 558

14. So much of the said act of the Legislature as prescribes such affidavit or test oath, is contrary to the Constitution of the United States, and to the Constitution of the State of West Virginia, and therefore null and void, from the passage thereof.

*Idem,* 558

15. The petition for a re-hearing, tendered to the circuit court in this case, is sufficient in substance and form, and should be received by the court below, and ordered to be filed; and the court further to proceed in the same, as justice requires and the law directs.

*Idem.* 558

16. In a suit in equity to enforce an alleged judgment and attachment lien, alleged to have been acquired in a proceeding at law against lands of the defendants to the alleged judgment and attachment, the defendants H, B. and S., to the bill and the said judgment and attachment, are proceeded against as non-residents of the State, and by publication. The alleged judgment is, by the court, by its decree, declared to be a lien upon the lands of R. and S., and the lands of R. and S. are, by the court, decreed to be sold to pay such judgment; and commissioners appointed by the court, for the purpose, sell two tracts of land of R., to the plaintiffs, and make report of the sales to court, and the court confirmed the sales and directed deeds to be made to the purchasers for the lands; and also decreed the disposition of a large part of the purchase money, for the benefit of the plaintiffs. R., whose lands had been sold, appeared in the court in which the decrees were rendered, within five years from the rendition of each of the decrees, and tendered to the court his petition for a rehearing of the proceedings in the cause without accompanying the petition with the affidavit prescribed in such case by the act of the Legislature, passed the 11th day of February, 1865, entitled "An act to amend and re-enact sections twenty-three, twenty-seven and twenty-eight of chapter one hundred and fifty-one, and section thirteen of chapter one hundred and seventy of the Code of Virginia," which affi-

avit, so prescribed, is commonly known and called the "Sultors' Test Oath." The court rejected said petition, and refused to allow it to be filed.—**Held:**

That it was error in the circuit court to reject and refuse said petition on the ground that it was not accompanied by such affidavit or test oath.

*Idem,* 578

17. So much of the said act of the Legislature as prescribes such affidavit or test oath is contrariant to the Constitution of the United States, and the Constitution of the State of West Virginia and therefore, invalid, null and void, from the passage thereof.

*Idem,* 578

18. The petition for a rehearing tendered to the circuit court in this case, is sufficient in substance and form, and should be received by the circuit court and ordered to be filed, and the court further to proceed upon the same, and in the cause, according to law and the practice and rules of courts of equity in such cases.

*Idem,* 578

19. Section nine of article three of the Constitution of 1863, of this State, providing that no salary or compensation of any public officer shall be increased or diminished during his term of office, applies only to such salaries or compensation of public officers as have been definitely fixed or prescribed by law; either by the Constitution of the State, or by some statute made in pursuance thereof.

*Rucker v. Supervisors,* 661

20. It was competent for the Board of Supervisors to fix the annual amount which the prosecuting attorney of a county should be allowed, under section sixty-six of chapter thirty-nine of the Code, or to reduce his allowance, after his term of office commenced, without, thereby, violating the foregoing article of the Constitution, or said sixty-sixth section of chapter thirty-nine of the Code.

*Idem,* 661

#### CONSTRUCTION OF DEEDS.

1. See Deeds Nos. 12, 13, 14, 15 and 16, and

*Hurst v. M. V. B. Hurst,* 289

2. See Deeds Nos. 18, 19, 20 and 21, and

*Hurst v. G. L. Hurst,* 339

#### CONTINGENT FEE.

See Measure of Recovery, and

*Polley & Son v. Anderson,* 202

#### CONTINUANCES.

A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and, although an appellate court will supervise the action of the court, on

such a motion, it will not reverse a judgment, on that ground, unless such action is plainly erroneous.

*Davis & Moore v. Walker,* 447

CONTRACTS.

1. A contract between M. and a railroad company provides that if M. shall fail to prosecute the work with such force as the engineer shall deem adequate to its completion within the time specified, the engineer, in charge, may proceed to employ such number of laborers, &c., as may be necessary to insure the completion of the work within the time limited; pay all persons so employed, and charge the amount to M; or the company may, for any neglect or omission on the part of M., in complying with the contract, declare the same abandoned and render it void, and the percentage, or as much thereof, remaining in the hands of the company, as may be necessary for its complete indemnity, be forever retained.—HELD:

That on the voluntary abandonment of the work by M., and while the contract is still subsisting between the parties, there is nothing in the hands of the company due to the contractor which may be attached.

*Strauss v. Railroad Co.,* 368

2. The contract provides that an estimate shall be made on the first of every month of the value of the work, and ninety per cent. thereof paid the contractor; and that upon the completion of the entire work a final estimate shall be made, and the balance then appearing due, shall be paid to the contractor: M. abandons the work in the middle of a month.—HELD:

That M. has earned nothing for the previous part of the month, and that the reserved estimates never became a debt which could be attached.

*Idem,* 368

3. See *List v. Wheeling,* 501

CONTRACTS BY LUNATICS.

See Estate of Lunatics Nos. 1 and 6, and *Hinchman, Admr. v. Ballard, Admr.* 152

CONTRACTS FOR PURCHASE OF LANDS BY A RAILROAD COMPANY AND PAYMENT THEREFOR IN STOCK OF COMPANY—EXECUTION OF SUCH CONTRACTS BY DECREE OF COURT.

When the contract for the purchase of land, by the Chesapeake and Ohio Railroad Company, provides that the purchase money is to be "paid in eight per cent. preferred stock of the Chesapeake and Ohio Railroad Company;" and the court in decreeing execution of the contract decrees that the Company issue and deliver in payment of the

purchase money, its stock guaranteed to pay eight per cent. thereon, IT IS ERROR.

*Dickinson v. Railroad Co.,* 390

CONTROL OF COURTS OVER ACTION OF COMMITTEES OF LUNATICS.

See Estates of Lunatics, Nos. 1, 2, 3, 4, 6 and 7, and

*Hinchman, Admr., v. Ballard, Admr.,* 152

CORPORATIONS.

1. See Common Carriers No. 1, and *Roderick v. Railroad Co.,* 54  
2. See Farmers' Bank of Virginia Nos. 1, 2 and 3, and

*Farmers' Bank v. Willis,* 31

3. See Payments Nos. 1 and 2, and *Farmers' Bank v. Willis,* 31

4. See Taking Land for Purposes of Public Utility, by Corporations, and

*Salt Company v. Brown,* 191

5. See Condemnation of Lands No. 1, and *Railroad Company v. Halstead,* 301

6. See Contracts Nos. 1 and 2, and *Strauss v. Railroad Company,* 368

7. See Constitutional Law Nos. 7 to 13, inclusive, and

*List v. Wheeling,* 501

8. See Condemnation of Lands No. 3, and *Railroad Co. v. Tyree,* 698.

CORRECTION OF DECREE IN APPELLATE COURT—WHEN.

See Practice in Appellate Court No. 9, and *Jones v. Cunningham,* 707

COUNCIL OF WHEELING—SUBSCRIPTION BY, TO CERTAIN RAILROADS.

See *List v. Wheeling,* 501

CRIMINAL PRACTICE.

If a person charged with a felony is entitled to be examined before the county court of the county wherein the offence is charged to have been committed, it is too late after verdict of guilty and judgment thereon, against the prisoner, to claim, in the appellate court, for the first time, the right to such examination, and to claim that the judgment of the circuit court should be reversed, and the verdict of the jury set aside, upon the allegation by him, in his petition for the writ of error, that he had not been examined before the county court, upon the charge of felony in the indictment contained, and had not, by his assent, entered of record in the circuit court, dispensed with such examination.

*State v. Stewart,* 731



**CROSS BILL—IN WHAT CASES PROPER OR NECESSARY TO FILE SAME—AND HOW CONSIDERED.**

1. See Practice in Chancery No. 4, and *Hinchman, Admr. v. Ballard, Admr.*, 152
2. See Practice in Chancery No. 13, and *Dickinson v. Railroad Co.*, 390
3. See Practice in Chancery Nos. 18 and 19, and *Baker v. Oil Tract Co.*, 454

**DEATH OF DEBTOR WHEN HIS REAL PROPERTY HAS BEEN ATTACHED IN A SUIT IN EQUITY—EFFECT OF.**

See Attachments of Real Property in Suits in Equity—When not Dissolved by Death of Debtor, and

*White v. Hoener, Sheriff, &c.*, 324

**DECISION OF SUPREME COURT OF APPEALS—EFFECT OF IN A CASE.**

See Renting of Lands by Decree or Order of Court, Nos. 1 and 2, and

*Hollingsworth & Co. v. Brooks*, 559

**DECLARATIONS.**

1. See Practice at Common Law No. 4, and *Roderick v. Railroad Company*, 54
2. See Pleading at Law, Nos. 6 and 7, and *Ocheltree v. McClung*, 233

**DECLARATIONS OF CO-CONSPIRATORS.**

When same may be proven—the effect of same—and as to cross examination, by defendant, as to defendant's statements during the transaction as part of *res gestæ*.

See Evidence Nos. 2 and 3, and

*Carshodon v. Williams*, 1

**DECREE FOR SALE FOR CASH—WHEN NOT ERRONEOUS.**

See Practice in Chancery No. 16 and 17, and *Baker v. Oil Tract Co.*, 454

**DECREE FOR SALE OF LAND—WHEN ERROR TO DECREE, AND WHEN NOT.**

See Practice in Chancery Nos. 15, 16 and 17, and *Baker v. Oil Tract Co.*, 454

**DEEDS.**

1. The fact that a deed was made, acknowledged and recorded during the war, does not render it null and void; there must be some special circumstances alleged to show *prima facie* the deed is null and void.

*Henderson & Co. v. Alderson*, 217

2. A deed, even if the consideration was Confederate money, if within the scope of legitimate contract and not in aid of the rebellion, regularly

acknowledged before, and recorded by a proper officer of the State Government, then under the power of the Confederate States Government, is good.

*Idem*, 217

3. See Married Women No. 2, and

*Idem*, 217

4. In Virginia, though the feoffment including livery of seisin—and deeds of lease and release, and the covenant to stand seised to a use, were sometimes used, the deed of bargain and sale was the ordinary conveyance of land that prevailed before the Code of 1849 took effect in 1850.

*Ocheltree v. McClung*, 232

5. Any valuable consideration, however small, is sufficient to support this conveyance; and the acknowledgment in the deed of the payment, is conclusive of the fact, so far as to give effect to the conveyance.

*Idem*, 232

6. This deed of bargain and sale was, and is, adequate to vest an estate in fee for land, in one person and afterwards, upon a contingency, to divest it out of him and vest it in another person, though the latter was not ascertained or in existence at the date of the deed. But such shifting and re-vesting of estate must be limited to take effect, if at all, within the time prescribed to prevent the creation of perpetuities.

*Idem*, 232

7. The deed may be employed to convey an estate and reserve or confer a power of appointment upon the execution of which the deed will vest the estate in the appointee. In such case the appointment is the event upon which the declaration in the deed operates to create the use, and, under the statute on the subject, to transfer the estate to the appointee.

*Idem*, 232

8. Such deed might be employed by a woman in contemplation of marriage, with the consent of the intended husband, effectually, to convey and limit the legal estate in land to a trustee in fee; in trust for herself till the marriage; and to allow the husband to occupy the land till the death of the one of them who should first die; and if she should survive, then to convey to her; but if she should die, the husband surviving, then to such person as the wife, notwithstanding the coverture, might, by last will published in the presence of three witnesses, appoint; and in default of such appointment the estate in the trustee to terminate—so as to revert to her heirs.

*Idem*, 232

9. The prevailing intent in each deed, properly manifest, will control its effect—as to whether the estate vested in the immediate bargainee, either for his own benefit or in trust, is a fee determinable, which on the happening of the con-

tingency or execution of the appointment, determines in him and shifts to another, or reverts to the bargainor; or, on the other hand, the legal estate in the trustee is a fee absolute and remains in him while a mere equitable interest is limited to an ultimate beneficiary.

*Idem*, 232

10. An appointment is the event upon which the limitation in a deed takes effect and vests the estate, legal or equitable, in the appointee. In itself it has no operative efficacy.

*Idem*, 232

11. When the deed specified an appointment by will, with sanctions not legally required in a will, the probate of the instrument, before the year 1850, does not furnish evidence that it was executed with such additional sanctions.

*Idem*, 232

12. S. H. (and wife), the rightful owner, in fee simple, of a tract of land, and the father of M. V. B. H., conveyed to M. V. B. H., by deed dated the 9th day of December, 1863, said tract of land situated in Harrison county, this State. In the early part of the deed the consideration of the deed is stated to be one dollar. The land is described in the deed by metes and bounds, and as containing one hundred and ninety acres, "to have and to hold the above described tract of land, with its appurtenances, to the said M. V. B. H. and his heirs and assigns forever. And S. H., and wife, covenant to and with, the said M. V. B. H., his heirs and assigns, to warrant and defend, generally, the above described tract, or parcel, of land, to the said M. V. B. H., his heirs, &c." In the deed, immediately after the last recited clause, are the following clauses, the one immediately following the other, viz: "(It is fairly understood that the above described tract or parcel of land is to be the said M. V. B. H.'s share of his father S. H.'s estate.) And it is further understood that I, S. H. hold a life interest in the above described tract of land."—HELD:

That, in effectment, the deed should be construed so as to arrive at the true intent of the grantor and grantee, and that in so doing the whole of the deed, and all its parts, should be considered together.

*Hurst v. M. V. B. Hurst*, 279

13. That, adopting the above rule, the plain legal effect of the deed, from its face was, and is, to convey to M. V. B. H., an estate in fee simple in the land to commence on the death of S. H., and that S. H. reserved to himself an estate for, and during, his life in the lands.

*Idem*, 289

14. That it was right and proper, in such case, for the court below to construe the deed according to its legal effect, from its face, and to instruct the jury as to what was its effect in law.

*Idem*, 289

15. That parol evidence as to the acts or declarations of the parties, at the time of the execution of the deed, or afterwards, are inadmissible and incompetent in such case, as evidence to enlarge, restrict, explain or alter the intention of the parties, as expressed in the deed, or to vary the legal effect thereof as clearly manifested by the deed itself.

*Idem*, 289

16. That the deed is not so ambiguous as to admit of the introduction of such parol evidence for the purpose of determining the true intent and meaning of the parties, by the language employed in the deed: or to show that it was the purpose and intent of the parties at the execution of the deed that the deed should pass to M. V. B. H. an estate in fee simple to take effect at the execution and delivery thereof, and not an estate in fee simple to take effect at the death of S. H.

*Idem*, 289

17. See Priority of Creditors No. 1, and

*Jameson v. Myles' Exor.*, 311

18. S. H. (and wife), the rightful owner in fee simple of a tract of land, and the father of G. L. Hurst, conveyed, by deed dated the 9th day of December, 1863, to G. L. H. said tract of land, situate in Harrison county, West Virginia. In the early portion of the deed, the consideration of the same is stated to be one dollar. The land is described in the deed by metes and bounds and as containing one hundred and sixty-one and one-half acres "to have and to hold the above described tract of land with its appurtenances, to the said G. L. H., and his heirs, and assigns forever. And S. H., and wife covenant to and with the said G. L. H., his heirs and assigns, to warrant and defend, generally, the above described tract or parcel of land to the said G. L. H., his heirs, &c." In the deed, immediately after the last recited clause, are the following clauses, the one immediately following the other, viz: "It is fairly understood that the above described tract or parcel of land is to be the said G. L. H.'s share of his father's S. H.'s estate. And it is further understood that I, S. H., hold a life interest in the above described tract of land."—HELD:

That, in effectment, the deed should be so construed as to arrive at the true intent of the grantor and grantee, and that in so doing the whole of the deed and all its parts should be considered together.

*Hurst v. G. L. Hurst*, 339

19. That, adopting the above rule, the plain legal effect of the deed, upon its face, was, and is, to convey to G. L. H., an estate in fee simple, in the land, to commence upon the death of S. H., and that S. H. reserved to himself an estate for, and during, his life in the lands.

*Idem*, 339

20. That parol evidence as to the acts or declarations of the parties at the time of the execution of the deed, or afterwards, are inadmissible and incompetent in such case, as evidence, to enlarge, restrain, explain or alter the intention of the grantor and grantee, as expressed in the deed, or to vary the legal effect thereof as clearly manifested by the deed itself.

*Idem*, 339

21. That the deed is not so ambiguous as to admit of the introduction of such parol evidence for the purpose of determining the true intent and meaning of the parties by the language employed in the deed, or to show that it was the purpose and intent of the parties at the execution of the deed, that the deed should pass to G. L. H., an estate in fee simple, to take effect at the execution and delivery thereof, and not an estate in fee simple to take effect at the death of S. H.

*Idem*, 339

22. A writing between parties, signed and sealed, by which the owner of a lot and the owners of other adjacent lots, agree that the latter, who sinks a well on the lot of the former, shall have access to it forever, and may use water from it, at all times—the writing not indicating that the parties contemplate any further assurance—is a present grant of the right to use the well.

*Warren and Wife v. Syme*, 474

23. Such a deed, though containing no express declaration that the right granted shall pertain to the adjacent lots, but providing that neither of the grantees shall dispose of the easement, unless at the same time he shall dispose of his lot, by implication, annexes the servitude to the respective lots, as an easement appurtenant to each.

*Idem*, 474

24. Intrinsic certainty, in a deed relative to specific property, is impossible. The description can be made certain only by proof or recognition of the identity of the subject to which it relates, or other objects or things that more or less directly and distinctly indicate and determine it. And, in the application of deeds and other documents to lands and lots, extensive latitude is allowed for the discovery and proof, not only of visible monuments or objects mentioned, but of mathematical lines of other lands and lots, and various classes of facts, to which the description or suggestions in the document may apply.

*Idem*, 474

25. The certainty of a deed is determined by the principles of the common law. The recordation is regulated by the statute alone.

*Idem*, 474

26. Under the law before the year 1819, when a deed was recorded it was as valid and effectual, as to all persons, as if there had been no legislation requiring recordation. But if before that

time, there had been doubt on the subject, by section four, of chapter ninety-nine of the Revised Code, adopted in that year, the validity of the deed, when recorded, was plainly declared.

*Idem*, 474

27. Whenever the holder of land made a deed for the conveyance of an estate or the creation of a servitude or easement upon it, that was valid and effectual, as to the alienor, the deed, when duly admitted to record, became alike valid and effectual to pass the estate or create the servitude, as to any subsequent purchaser of the land, from him, for valuable consideration without notice and as to all other persons.

*Idem*, 474

28. The opinion of the court of appeals of Virginia, expressed in the case of *Mundy v. Vauter*, and other cases considered with it, (3 Gratt. 518—see 545,) that a deed executed in 1807, for all the estate, both real and personal of the grantor, because of the want of designation and description of the lands intended to be conveyed, was not notice, in point of law, to a subsequent purchaser from the grantor, of the existence of the deed, but that the proof of notice must be such as to affect the conscience of the purchaser; though in its application to the peculiar circumstances of that case not questioned, is, as a general proposition, disapproved.

*Idem*, 474

29. A recital in a deed, under the bankrupt act of 1841, that a person was, by the United States District Court declared a bankrupt, and that the grantor was assignee and ordered to sell the property granted, is not evidence of the facts recited, against a person claiming the property otherwise than through or under the grantor.

*Idem*, 474

30. A recital in a deed of partition that a person died, and that the parties to the deed are his heirs, is not evidence of these facts, against strangers.

*Idem*, 474

31. Generally, parol evidence, though not excepted to when it is offered or afterwards, is not competent to prove the contents or effect of a deed.

*Idem*, 474

32. See Defective Certificates of Acknowledgments of Deeds and the Curing of Same Nos. 1 and 2, and

*Leitch v. Neal*, 569

#### DEEDS FOR LANDS PURCHASED AT DELINQUENT TAX SALES.

1. Where less than the whole tract of land was sold by the sheriff for delinquent taxes, in the year 1860, and a deed was made by the Recorder of the county in which such sale was had, under the said act of 1863, and proceedings had according to its provisions, after the passage of the

act of 1866, and no survey and plat of survey was made and returned, as required by said act of 1863, prior to the execution of such deed, and reference to such survey and plat is not made in the deed as having been made and returned—such deed, for this cause, does not pass the title of the former owner, and is void.

*Forqueran v. Donnelly*, 114

2. While the deed aforesaid was, and is, not valid to pass title, still the equitable title or interest in the land, subject to the right of redemption, did not become extinguished by the deed being invalid, but was in existence at the adoption of the Code of 1868; and when it took effect it was competent for the Legislature to pass laws by which the purchaser could obtain a sufficient deed for the land purchased by him at the said tax sale. And the 24th section of chapter 31 of the Code of 1868 does provide such remedy; but the deed under that section must have been made within two years from the passage of said Code, where the sale occurred more than five years before the passage of the Code; and the owners, their heirs and assigns, had the right to redeem at any time before such deed was made. If the purchaser, or his heirs or assigns, cannot show that he or they properly procured a proper and sufficient deed for the land purchased at said tax sale, within two years from the 29th day of December, 1868, the date of the passage of said Code, then it must be considered and held, that the equitable right or interest of the purchaser, acquired by his said purchase, has been extinguished.

*Idem*, 114

The 40th section of the 31st chapter of the Code does not cure or validate the deficiency or defect in the said deed, made by the Recorder—the decree in the suit being made on the 28th day of April, 1869, only a few days after the Code took effect, and, perhaps, would not cure or validate the defect under any other circumstances.

*Idem*, 144

#### DEEDS MADE DURING THE WAR.

See Deeds No. 1 and 2, and

*Henderson & Co. v. Alderson*, 217

#### DEEDS OF BARGAIN AND SALE MAY BE EMPLOYED FOR WHAT PURPOSE

See Deeds Nos. 7 and 8, and

*Ochee v. McClung*, 232

#### DEFECTS IN DEEDS—CURING OR VALIDATING OF.

See Deeds for Lands Purchased at Delinquent Tax Sales No. 3, and

*Forqueran v. Donnelly*, 114

#### DEFECTIVE CERTIFICATES OF ACKNOWLEDGEMENTS OF DEEDS, AND THE CURING OF THE SAME.

1. The certificate of a Recorder that a married woman, having been examined separately and apart from her husband, and having a writing fully explained to her, declared the same to be her act, and that she did not wish to retract it, is fatally defective—the words, “that she had willingly executed the same,” or words of equivalent import, having been omitted.

*Leftwich v. Neal*, 569

2. The defective acknowledgment of such deed cannot be aided or cured by parol testimony.

*Idem*, 569

#### DELINQUENT TAX SALES.

See Purchasers at Delinquent Tax Sales Nos. 1, 2 and 3; and also Repeal of Statutes Nos. 1, 2, 3 and 4, and

*Forqueran v. Donnelly*, 114

#### DEMURRER IN PROCEEDINGS AT LAW.

1. See Pleading—At Law No. 1, and

*Carshadon v. Williams*, 1

2. See Pleading—At Law No. 5, and

*Polsley & Son v. Anderson*, 202

#### DEMURRER IN PROCEEDINGS IN CHANCERY.

1. See Appellate Court No. 5, and

*Hinchman, Admr. v. Ballard, Admr.* 152

2. Though a bill be multifarious, and but vaguely state the matter on which relief is sought, consent by the parties to an interlocutory decree that the cause be referred to a commissioner, to audit, state and settle an account of the amount due each of the plaintiffs, is a waiver of any objection to such irregularity; and a demurrer thereafter, for such cause, is properly disallowed.

*Rittenhouse v. Harman*, 380

#### DESCRIPTION IN DEEDS—HOW MADE CERTAIN.

See Deeds No. 24, and

*Warren and Wife v. Syme*, 474

#### DIGNITY OF DEBTS.

See Priority of Creditors No. 1, and

*Jameson v. Myles' Exor.*, 311

#### DISMISSAL OF APPEAL AS IMPROVIDENTLY ALLOWED—WHEN.

See Practice in Appellate Court No. 8, and

*Dickinson, Exor., v. Lewis*, 678

# DISMISSAL OF BILL IN CHANCERY—WHAT SUFFICIENT GROUND FOR.

See Injunctions No. 7, and  
*McClung v. Livesay*, 329

# DISMISSAL OF BILL DISSOLVES AN INJUNCTION.

See Practice in Chancery No. 21, and  
*Warren and Wife v. Syme*, 474

## DISSOLUTION OF INJUNCTION.

1. See Injunctions No. 4, and  
*Ludington v. Handley*, 263

2. See Practice in Chancery No. 21, and  
*Warren and Wife v. Syme*, 474

# DISSOLUTION OF PARTNERSHIP—POWERS OF PARTNERS AFTER.

See Partners and Partnership No. 1, and  
*Ruffner, Donnelly & Co. v. Hewitt, Kervel & Co.*, 585

# DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

1. See Proceedings to Enforce the Lien of a Judgment and the Proof of such Judgment Nos. 6 and 7, and

*Dickinson v. Railroad Co.*, 390

2. See Affidavits No. 3, and  
*Parker v. Clark*, 467

3. See Oath—Who may Administer Same, No. 1, and

*Idem*, 467

## DISTURBANCE OF POSSESSION.

Generally, a person can not be disturbed in the possession or enjoyment of property or held responsible for an act done relating to it, by any person not entitled to the property, or its possession or enjoyment.

*Warren and Wife v. Syme*, 474

# DOCKETING JUDGMENT—WHAT EVIDENCE OF, AND WHEN.

See Proceedings to Enforce the Lien of a Judgment and the Proof of such Judgment, No. 5, and

*Dickinson v. Railroad Co.*, 390

# DOCKETING A SUMMONS IN UNLAWFUL DETAINER—AS TO.

See Practice at Common Law Nos. 1, 2 and 3, and

*Gas Company v. Wheeling*, 22

## DOWER.

See Married Women No. 1, and  
*Henderson & Co. v. Alderson*, 217

## EASEMENTS.

See Condemnation of Lands No. 1, and  
*Railroad Company v. Halstead* 301

1. A provision in a deed, creating a servitude upon an estate and annexing it to another estate, as an easement appurtenant to the latter, declaring that the grantee shall not dispose of the easement separately from the property to which it is annexed, is not a restraint upon alienation that is objectionable.

*Warren and Wife v. Syme*, 474

2. A conveyance of property to which an easement is appurtenant, and without which the easement cannot be granted, made by an assignee in bankruptcy, implies the transfer of the easement with the property—Notwithstanding it does not appear that the use of the easement was necessary to the enjoyment of the property, or that at the time of the conveyance the easement was, in fact, used with the property.

*Idem*, 474

3. When, by direct proof of a grant, or other sufficient evidence, an easement has been conclusively established, there may be proof of an act or declaration of the owner, indicative of renunciation or abandonment, followed by non-use for a period long enough to bar an action of ejectment to recover the possession of the land; which when the defendant is not under disability, is ten years; and when he or she is under disability, is twenty years: Or proof of a claim by the owner of the corporeal estate, or another in his stead, known to the owner of the easement, or evinced by acts, that, in the exercise of ordinary vigilance he would have learned, followed by non-use by the owner for such period: Or an act or declaration by the owner of the easement, clearly demonstrative of actual abandonment of the easement, that, in fact, promotes some action on the part of another, by which, if the easement were not held to be determined, the latter would be seriously injured: And such proof may conclude the extinguishment of the easement. But nothing less than one or the other of these combination of facts, will have such effect. The limited right of a husband in the inheritance of his wife, may, by such acts and declarations, be affected for the time of its duration, as the right of any other person.

4. See Deeds Nos. 22 and 23, and  
*Idem*, 474

*Idem*, 474

## EJECTMENT—ACTION OF.

1. See Pleading—At Law Nos. 6 and 7, and  
*Ocheltree v. McClung*, 232

2. See Deeds No. 12, and  
*Hurst v. M. V. B. Hurst*, 239

3. See Deeds No. 13, and  
*Hurst v. G. L. Hurst*, 339

EMINENT DOMAIN.

1. See Condemnation of Lands Nos. 1 and 3, and

*Railroad Company v. Halstead,* 301

and

*Railroad Co. v. Tyree,* 693

2. See Taking Land for Purposes of Public Utility, by Corporations, and

*Salt Company v. Brown,* 191

EQUITABLE JURISDICTION.

See Constitutional Law, No. 10, and

*List v. Wheeling,* 501

ESTATES—LIFE—RESERVATION OF—BY DEED.

1. See Deeds Nos. 12, 13, 14, 15 and 16, and

*Hurat v. M. V. B. Hurat,* 289

2. See Deeds Nos. 18, 19, 20 and 21, and

*Hurat v. G. L. Hurat,* 339

ESTATE OF LUNATICS.

1. L., by contract in writing, under seal executed by him and J. and H., sells to J. and H. several tracts of land for a stipulated price to be paid by J. and H. to L. at stated times; and under and by virtue of the contract of sale. J. and H. are put in actual possession of the lands by L., and J. and H. in pursuance of such contract, pay a large amount of the purchase money, but not all of it, and it is applied in discharge of purchase money liens existing against part of the land. Afterwards, and while J. and H. are in possession of the land under such contract, and before all the purchase money is paid by J. and H., L. P. H. is appointed committee of L., who is then insane, by the county court. After his appointment as committee, L. P. H. filed a bill in the circuit court of the county where the land was situated against J. and H. and others, to rescind and annul said contract of sale, upon the ground that L., at the time of its execution, was insane. Afterwards, and while the suit was pending, L. P. H., committee, and J. and H. executed a paper writing in these words, to-wit: "This article of agreement, made and entered into, this 29th day of March, 1861, between Lewis P. Holloway, committee of D. B. Layne, of the one part, and William Hinchman, Jr., and Thomas Johnson, of the other part, witnesseth: That the said Lewis P. Holloway pledges himself to come to the house of the said Thomas Johnson on the 18th day of April, 1861, for the purpose of consummating a compromise in a suit in chancery, instituted in the circuit court of Monroe county, in which said Holloway is plaintiff and the said Hinchman and Johnson are defendants, upon the following terms here agreed upon, to-wit: That the said Lewis P. Holloway binds himself to pay to said Johnson and Hinch-

man the amount of money they have paid John Echols for land bought of D. B. Layne, with interest from the time of said payment until all is refunded by said Holloway; and said Holloway is to return them, the said Hinchman and Johnson's bonds given to said Layne for the purchase money of said land; and the said Holloway is to pay said Johnson and Hinchman's lawyer's fee, amounting to \$200, and is to dismiss the said suit upon the terms to-wit: That each party is to pay his own costs in said suit. The said Johnson and Hinchman are to pay to the said Holloway rent for the said land during the time they occupied it, and the said Johnson and Hinchman are to have possession of the said land until Christmas, and have the privilege of moving their grain, &c., and are to pay said Holloway for the corn and oats they sow and raise this season, the usual grain rent; and the said Holloway is to pay the said Johnson and Hinchman for the improvements they have made upon said land, and if they can not agree as to the value of said improvements, they are to choose disinterested persons to value the same. The said Holloway is to take for the rent of the islands rented by the said Hinchman and Johnson the usual grain rent or the rent that Johnson and Hinchman are to get for same. Witness the following signatures and seals:

(Signed,)

LEWIS P. HOLLOWAY, Com., (Seal.)  
THOMAS JOHNSON, (Seal.)  
WILLIAM HINCHMAN, Jr., (Seal.)

L. P. H. died after the date of this agreement without ever having done any act towards consummating the same. L. also died insane. J. and H. continued in the possession of the lands as before. J. and H. never saw L. P. H. after the date of said agreement. After the death of L. P. H. and L., and in October, 1866, J. and H., still in the possession of said lands and without having actually performed any part of said agreement, filed their bill in the circuit court of the county of Monroe, in this State, where the lands are situated, against the personal representative and legal heirs of L., &c., for the specific execution of said agreement of compromise; and the bill does not allege that L. was insane at the date of the contract by him with plaintiffs.—HELD:

That, as the said agreement of compromise, if it were complete and final and carried into effect, would change the nature and condition of the estate of L., (the insane person), L. H. P., as committee, had no authority to make the same, so as to bind the personal representative and legal heirs of L. without the approbation or direction of the court by which he was appointed committee, or of some other court having jurisdiction of the subject.

*Hinchman, Admr. v. Ballard, Admr.,* 152

2. That as the said agreement of compromise was made by the committee without the approval or direction of the court by which he was appointed, or of any court having jurisdiction of the subject, a court of equity will not decree a specific execution thereof, as against the personal representatives and legal heirs of L., unless it appears to the satisfaction of the court that the agreement was beneficial and advantageous to L., or his estate.

*Idem*, 152

3. Although a committee of an insane person may sue to set aside a deed or contract of the insane person, touching his estate, made prior to the time he was appointed committee, upon the ground that such insane person was insane at the time of making such deed or contract of sale: Still if the committee does not bring such suit and, while the suit is pending, he makes an agreement of compromise with the defendant, which, if carried into effect, will change the nature and condition of the estates of the insane person, without the direction or approval of the court having jurisdiction of the subject, a court of equity will not, in another suit, decree specific performance of such agreement of compromise against the personal representatives and legal heirs of the insane person, unless it appears that the insane person was insane at the time of the making of the deed or contract, and that the agreement of compromise was beneficial and not injurious to the insane person or his estate.

*Idem*, 152

4. Generally, the conduct and acts of a committee of an insane person, in relation to the estate of such insane person, are subject to the direction approval or disapproval of the court having jurisdiction of the subject.

*Idem*, 152

5. That the fact that the committee of an insane person is authorized by law to sue and be sued, touching the estate of such insane person, does not, in and of itself, authorize the committee to compromise a suit brought by him, so as to change the nature and condition of the estate of the insane person.

*Idem*, 152

6. It appearing in this case that L. at the time he made the contract of sale of the land was sufficiently sane to make the contract, and that the contract was beneficial to his interest, and it not appearing that the contract of sale is invalid, for any cause, or that the agreement of compromise was beneficial to the interest of L., (the insane person) for these reasons alone, a court of equity ought to refuse to decree specific execution of the agreement of compromise, (if it were complete and final on its face) against the personal representative and legal heirs of L.

*Idem*, 152

7. The said agreement of compromise, if it were not otherwise objectionable, is not such a final, complete contract, as a court of equity will enforce by decree of specific performance.

*Idem*, 152

#### ESTATES TO COMMENCE IN FUTURO.

1. See Deeds Nos. 13, 15 and 16, and

*Hurst v. M. V. B. Hurst*, 289

2. See Deeds Nos. 19, 20 and 21, and

*Hurst v. G. L. Hurst*, 339

#### EXECUTORS AND ADMINISTRATORS..

1. See Confederate Money No. 1, and

*Jameson v. Myles' Exor*, 311

2. See Priority of Creditors No. 1, and

*Idem*, 311

3. See Administrators, Appointment of in Place of those Appointed under Confederate Authority, their Powers, &c., No. 1, and

*Clay v. Robinson, Admr.*, 348

#### EXPERTS.

See Evidence No. 11, and

*Clay v. Robinson, Admr.*, 348

#### EVIDENCE.

1. In an action for false imprisonment, evidence as to the kind, quality and quantity of food, is not admissible, unless the fact is specifically alleged in the declaration.

*Carskadon v. Williams*, 1

2. Declarations of one or more conspirators, cannot be proven to affect his or their, fellow, until the fact of conspiracy between the parties has been first shown.

*Idem*, 1

3. When the declarations of co-conspirators have been proven, by a witness not connected with the conspiracy, he may be cross-examined by defendant as to defendant's statements during the transaction, as part of *res geste*.

*Idem*, 1

4. A copy of an order of the county court of Alleghany county, Commonwealth of Virginia, attested by the clerk of such court, may be received and read as evidence in lieu of the original, by the courts of this State, under the provisions of the act of the Legislature of 1866, upon that subject, which is incorporated into the Code of this State, of 1863, in sections five, six and seven of chapter one hundred and thirty.

*Hinchman, Admr. v. Ballard, Admr.*, 132

5. A copy of such order, so attested, is proper evidence of the appointment, by the county court of said Alleghany county, of a committee of an insane person.

*Idem*, 132

6. See Deeds No. 11, and  
*Ocheltree v. McClung*, 232
7. See Deeds Nos. 15 and 16, and  
*Hurst v. M. V. B. Hurst*, 289
8. When an assignor and assignee of a chose in action are both parties to a suit brought to recover the money due upon such chose in action, and the debtor is not living, the assignor is incompetent to testify as a witness in such suit in favor of his assignee.  
*White v. Hearner, Sheriff, &c.* 324
9. And in such case a release made by the assignee to the assignor, from all and every liability to recouse or otherwise, as assignor of the chose in action, does not make the assignor a competent witness to testify in favor of his assignee.  
*Idem*, 324
10. See Deeds Nos. 20 and 21, and  
*Hurst v. G. L. Hurst*, 339
11. C., brought an action of debt against R., administrator of A., to recover the amount of a bond made by A., and another, to C., in the lifetime of A. One of the pleas in the cause was payment, on which issue was joined. At the trial, C., to maintain the issue on his part, gave in evidence to the jury the said bond dated 9th of August, 1859. R., then, to maintain the issue on his part, read in evidence a paper purporting to be a receipt from C., plaintiff, to A., deceased, in full of all demands, dated October 15th, 1860; C., denying the genuineness of said receipt, and of the signature thereto, was then permitted, by the court, without objection, to prove to the jury, by evidence, that the body of said bond was in the hand writing of C.—  
**Held:**  
That, after the court had so allowed the proof, that the body of said bond was in the hand writing of the plaintiff to go to the jury, without objection as aforesaid, it was error in the court to permit a witness, who was an expert, and who was not acquainted with the hand writing of C., to give as evidence his opinion, (founded solely upon the comparison of the hand writing of the body of said bond, and the signature to said receipt, that the body of the bond and the signature to the receipt was not written by the same person, as the fact that the body of the bond was in the hand writing of C., plaintiff, does not appear to have been admitted by the defendant, or that the defendant was in any way estopped from denying the fact; and it not appearing that the said bond, or receipt belonged to the witness, who was himself previously acquainted with the party's hand writing, and exhibited them, or either of them, in confirmation or explanation, of his testimony. (Perhaps other cases may arise where such evidence would be admissible, and cases also which should be held to be exceptions to the rule which is not now determined.) Here the writings were not of ancient, but of comparatively recent date, and witnesses were examined who were acquainted with plaintiff's hand writing.  
*Clay v. Robinson, Admr.*, 348
12. The plaintiff having examined witnesses to impeach the character of — Miller, for truth and veracity, the defendant, to sustain the character of his witness, Miller, introduced before the jury a witness, and asked him if he knew the character of said Miller, for truth and veracity, among his neighbors, and he replied, "I cannot say I do." Witness then said he resided four or five miles from said Miller, and had known him for four or five years, and that he had never heard a word against him as a man of truth and veracity. And, thereupon, the defendant asked the witness "whether he would, or would not, believe said Miller upon oath."—**Held:**  
That the court properly refused to permit the witness to answer the question.  
*Idem*, 348
13. See Proceedings to Enforce the Lien of a Judgment and the Proof of such Judgment Nos. 1, 2, 3, 4, 5 and 6, and  
*Dickinson v. Railroad Co.*, 390
14. See Deeds Nos. 29, 30 and 31, and  
*Warren and Wife v. Syme*, 474
15. Telegraphic dispatches are not privileged communications, but may be called for and given in evidence, whenever, in the opinion of court, they are regarded as proper or competent testimony.  
*National Bank v. National Bank*, 544
16. A dispatch or copy of a dispatch, purporting to have been written and sent by A B, as cashier, to C. D, cannot be read in evidence without first proving that it is a genuine paper, that is, that it was written and sent by the party whose name it bears.  
*Idem*, 544
17. See Defective Certificates of Acknowledgments of Deeds and the Curing of the Same No. 2, and  
*Leftwich v. Neal* 569
18. See Accounts of Sales, and  
*Ruffner, Donnelly & Co. v. Hewitt, Kercheval & Co.*, 585
19. On the trial of an issue under the plea of *non assumpsit*, C., the plaintiff introduces evidence tending to prove that a contract was made by the defendant L. to pay him \$1,000 *per annum* for wages and that said contract was agreed to be kept secret that others in the employment of the defendant might not be incited to demand an advance in their wages; that plaintiff continued under said contract for about three years, and had received \$2,340; that defendant introduced evidence tending to prove that no such contract was made, but plaintiff was to receive \$15 per week during said



three years, and that that amount per week was paid him during that time; and that a few days before said three years expired, plaintiff made a claim of \$1,000 per year as being their contract, but which was denied by the defendant and nothing further was said at that time; that it was further proved that no other claim was made by plaintiff until about six months afterwards, when suit was brought, and, thereupon, the defendant offered to give evidence to the jury as follows, to-wit: "that the plaintiff was, during said three years, and ever since has been, in very poor and very needy circumstances, pecuniarily."—HELD: That the evidence is inadmissible.

*Campbell v. Lynn & Co.*, 665

20. See Bill of Discovery, and

*Jones v. Cunningham*, 707

#### FARMERS' BANK OF VIRGINIA.

1. The court may judicially recognize or inform itself as to the charter of the Farmers' Bank of Virginia, or other like bank, and as to its organization and acceptance of a provision for the exclusion of its existence.

*Farmers' Bank v. Willis*, 31

2. The Bank had the right to assign its assets for the benefit of its creditors, independently of the act of the General Assembly of Virginia, passed in 1866, on that subject.

*Idem*, 31

3. The deed made in 1867, by the Bank, when hopelessly insolvent, for the transfer of its assets to trustees for the payment of specific liens, and then, as far as adequate, for the payment of all its other debts, was valid and effectual, for that purpose.

*Idem*, 31

4. For a historical statement of the various acts of the General Assembly of Virginia, relating to the Farmers' Bank of Virginia, see opinion of Hoffman, Judge, in

*Farmers' Bank v. Willis*, 31

#### FINALLY DECIDED.

See *Res Adjudicata*, and

*Camden v. Werninger*, 528

#### FOREIGN ATTACHMENTS IN EQUITY.

1. In a proceeding in equity, in the nature of a foreign attachment, against a non-resident of the State, to subject his property, in the State, to the payment of a debt, under the eleventh section of chapter one hundred and fifty-one of the Code of Virginia of 1860, it is not material that the order of attachment, endorsed on the summons, by the clerk, should specify the property of the debtor mentioned in the affidavit in which the order of attachment was issued.

*King v. Board*, 701

2. Although, in such case, the order of the attachment does not recite that an affidavit has been filed or refer to any affidavit on its face, still, if it sufficiently appears by the record that a sufficient affidavit was filed by the plaintiff, with the clerk, when the order of attachment was issued, the order of attachment being otherwise sufficient, is good.

*Idem*, 701

#### FORFEITURES IN CONTRACTS.

See Contracts Nos. 1 and 2, and

*Strauss v. Railroad Co.*, 368

#### FRAUD AND FRAUDULENT MISREPRESENTATIONS.

1. When a party, intentionally or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in such case, there is a positive fraud. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead as well as by positive assertions.

*Dickinson v. Railroad Co* 390

2. If a party, for a fraudulent purpose, states a fact which is untrue, and without knowing it to be true, and he does not, at the time, believe it to be true, this is both a legal and a moral fraud. And where the representation, expressly or impliedly, forms a part of the contract between parties, it is not essential, in order to invalidate the contract, that there should have been a moral fraud.

*Idem*, 390

3. If, upon a sale, the vendor makes material representations of matters of fact, as of his own knowledge, and they are in fact untrue, and the vendee is deceived thereby, the sale will be voidable, although the vendor did not know whether they were true or not.

*Idem*, 390

#### GARNISHMENT.

See Contracts Nos. 1 and 2, and

*Strauss v. Railroad Co.*, 368

#### HANDWRITING.

See Evidence No. 11, and

*Clay v. Robinson, Admr.*, 318

#### IMPEACHING WITNESSES.

See Evidence No. 12, and

*Clay v. Robinson, Admr.*, 348

#### INJUNCTIONS.

1. An injunction is not granted to restrain a mere trespass to real property, when the bill does not, on its face, clearly aver a good title in the

plaintiff; nor, even then, as a general rule, (though perhaps not universal) where the injury complained of is not destructive of the substance of the inheritance of that which gives it its chief value, or is not irreparable, but is susceptible of complete pecuniary compensation and for which the party may obtain adequate satisfaction, in the ordinary course of law.

*McMillan v. Ferrell*, 223

2. A. files his bill praying for an injunction to restrain the sale, by a trustee, of a tract of land conveyed to secure the purchase money, alleging "that since the purchase was made, the plaintiff had caused a survey of the land to be made, and instead of there being fifteen hundred acres as represented, there were only nine hundred acres," and this being the only allegation in the bill, on the ground on which relief is asked.—**Held:**

That the bill does not present sufficient equity, on its face, to justify the interference of a court of equity.

*Reed v. Patterson*, 263

3. L. & M. file a bill in chancery, praying for an injunction and general relief against a judgment for the payment of money, on the ground of newly, or after discovered testimony, that the debt was paid off and discharged.—**Held:**

That the plaintiffs must show that they have used due diligence, or been guilty of no laches.

*Ludington v. Handley*, 269

4. That, if the evidence is manifestly insufficient to sustain the defence set up, that the injunction was properly dissolved and the bill dismissed.

*Idem*, 269

5. In a bill, filed to restrain the collection of taxes for school purposes, in a certain township, the plaintiff must aver that he sues, not only on his own behalf, but, also, on behalf of all others, similarly situated. Such averment is essential to a complete determination of all the rights affected by the suit.

*McClung v. Livesay*, 329

6. The general allegation of irreparable injury is not sufficient, without some equitable circumstances be shown,—as insolvency, impediment to judgment at law, or to adequate legal relief, or a threatened destruction of the property, or the like.

*Idem*, 329

7. The want of such allegation is sufficient ground for dismissing the bill.

*Idem*, 329

8. See Practice in Chancery No. 21, and *Warren and Wife v. Syme*, 474

9. See Constitutional Law Nos. 10 and 12, and *List v. Wheeling*, 501

10. A court of equity has jurisdiction to enjoin a sheriff from making sale of personal property for the payment of taxes, on which he has levied,

where the bill alleges that said taxes have been fully paid and discharged.

*Leavis v. Spencer*, 689

11. Upon proof that the taxes have been paid off and discharged, the injunction will be perpetuated.

*Idem*, 689

# INJUNCTIONS TO JUDGMENTS AT LAW.

See Injunctions No. 2 and 4, and *Ludington v. Handley*, 269

## INSTRUCTIONS TO JURY.

1. See Appellate Court No. 8, and *Ocheltree v. McClung*, 232

2. See Appellate Court No. 11, and *Clay v. Robinson, Admr.* 348

3. Instructions to the jury should be pertinent to the issue, and not addressed to a different inquiry than that contained therein; and should not be couched in ambiguous language, or be of doubtful meaning, and if otherwise, they should be refused.

*Henry v. Davis*, 715

## INTENT IN DEEDS.

See Deeds No. 9, and *Ocheltree v. McClung*, 232

## INTRINSIC CERTAINTY IN DEEDS IMPOS- SIBLE.

See Deeds No. 24, and *Warren and Wife v. Syme*, 474

## IN WHAT CASES SETTLED ACCOUNTS WILL BE OPENED IN EQUITY.

See Settled Accounts No. 2, and *Ruffner, Donnelly & Co. v. Hewitt, Kerecheval & Co.*, 585

## ISSUE OUT OF CHANCERY.

For principles that have been heretofore decided by the court of appeals of Virginia regarding issues out of chancery and a discussion of same, see opinion of Paull, Judge, in *Henry v. Davis*, 715

## JUDGMENTS, PROOF OF, IN SUITS IN EQUITY TO ENFORCE JUDGMENT LIEN — WHAT, WHERE EXISTENCE OF SAME DENIED.

1. See Proceedings to Enforce the Lien of a Judgment, and the Proof of such Judgment Nos. 1, 2, 3, 4, 5, 6, 7 and 8, and

*Dickinson v. Railroad Co.*, 390

## JUDGMENTS OF WHAT COURTS A LIEN ON REAL ESTATE UNDER SECTION 5 OF CHAPTER 130 OF THE CODE OF WEST VIRGINIA.

See Statutes No. 15, and *Dickinson v. Railroad Co.*, 390

## JUDICIAL RECOGNIZATIION OR INFORMATION.

See Farmers' Bank of Virginia No. 1, and  
*Farmers' Bank v. Willis*, 31

## LEGAL AND MORAL FRAUD—WHAT.

See Fraud and Fraudulent Misrepresentations  
No. 2, and

*Dickinson v. Railroad Co.*, 395

## LEGISLATURE—POWER OF.

Has Legislature power to restrain or restrict  
original jurisdiction of Court of Appeals of this  
State? *Query* by Haymond, President.

*Forquern v. Donnelly*, 101

## LIENS ON REAL ESTATE—WHAT JUDGMENTS A.

See Statutes No. 15, and  
*Dickinson v. Railroad Company*, 390

## LIMITATIONS IN EQUITY.

See Statute of Limitations No. 1, and  
*Pitzer, Admr. v. Burns*, 63

## MARRIED WOMEN.

1. A deed made, acknowledged and recorded  
during the War, for that reason, is not null and  
void. If the consideration of the same was Con-  
federate money and if it was within the scope of  
legitimate contract, and not in aid of the rebellion,  
and regularly acknowledged before and recorded  
by a proper officer of the State Government, then  
under the power of the Confederate States Gov-  
ernment, the deed is good.

*Henderson & Co. v. Alderson*, 217

2. A married woman having united with her  
husband, as grantor, in such a deed, is not enti-  
tled to dower in the land so conveyed.

*Idem*, 217

3. See Deed No. 8, and

*Ocheltree v. McClung*, 232

4. See Defective Certificates of Acknowledg-  
ments of Deeds and the Curing of the Same Nos.  
1 and 2, and

*Leftwich v. Neal*, 569

## MEASURE OF RECOVERY.

1. P. & Son, attorneys, contract, in writing,  
with L. as follows: It is agreed that P. & Son are  
to receive one hundred dollars certain, and if the  
suit (referred to and mentioned in the agreement)  
is decided in favor of L. then P. & Son are to re-  
ceive two hundred dollars, making three hundred  
in all."

P. & Son bring an action of assumpsit, setting  
forth the agreement and alleging that L. dismissed  
said suit without their consent and thereby hin-  
dered P. & Son from prosecuting said suit to a

final decision, although plaintiffs were willing  
and ready so to do. The declaration also contains  
the common counts for work and labor, and upon  
an account stated.—HELD:

That P. & Son are not necessarily entitled, upon  
issue joined on a plea of non-assumpsit, in addi-  
tion to the \$100 certain, named in the contract, to  
recover the whole amount of the contingent fee  
therein specified; but for breach of said contract,  
by defendant, may recover such damages, by way  
of compensation for their time, labor and atten-  
tion, as these are reasonably worth; as well, also,  
for any loss or injury, they may have sustained;  
provided, the whole recovery shall not exceed the  
entire amount stipulated in the contract.

*Potsley & Son v. Anderson*, 202

## NATIONAL BANKS.

1. The act of Congress, passed on the 3d day of  
March, 1869, making it unlawful for a national  
bank to certify checks, unless the drawer has, at  
the time, an amount of funds on deposit in said  
bank equal to the amount specified in the check,  
does not invalidate an oral acceptance of a check,  
or an oral promise to pay a check, there being at  
the time sufficient funds of the drawer in posses-  
sion to meet it.

*National Bank v. National Bank*, 544

2. The said act of Congress does not invalidate a  
conditional acceptance of a check by a national  
bank having no funds of the drawer in its hands  
at the time, but that it will pay the same when-  
ever a draft, left with it for collection by the  
drawer, and sufficient in amount for the purpose,  
shall have been paid.

*Idem*, 544

## NEWLY DISCOVERED TESTIMONY.

1. When new trial will be granted on the  
ground of newly discovered testimony.

See New Trials No. 2, and

*Roderick v. Railroad Company*, 54

2. See Injunctions Nos 3 and 4, and

*Ludington v. Handley*, 239

## NEW TRIALS.

1. A new trial will not be granted after verdict  
because the amount of damages assessed by the  
verdict, exceeds the amount claimed in the writ,  
but not the amount laid in the declaration.

*Roderick v. Railroad Co.*, 54

2. A new trial will be granted on the affidavit of  
a party, or of some other person, on the ground of  
newly discovered testimony, where the affiant  
shows that he has conversed with the witnesses,  
and details the testimony which they will give,  
and the court sees that it is not cumulative, and  
if there be a jury, would produce a different ver-  
dict; and where such testimony was unknown

to the plaintiff and he had used due and proper diligence to procure it

*Idem*, 54

3. A new trial will not be granted where a case has been fairly submitted to the jury and a verdict fairly rendered, unless manifest wrong and injustice have been done, or unless the verdict is plainly not warranted by the facts proved.

*Campbell v. Lynn & Co.*, 665

4. See Practice in Appellate Court No. 10, and

*Henry v. Davis*, 715

# NOTICE BY ARBITRATORS OF THE TIME AND PLACE OF THEIR PROCEEDING—WHEN NECESSARY.

See Arbitration and Award No. 2, and

*Dickinson v. Railroad Co.*, 390

# NOTICE TO SUBSEQUENT PURCHASERS AS TO A DEED EXECUTED IN 1805.

See Deeds No. 28, and

*Warren and Wife v. Syme*, 474

# OATHS—WHO MAY ADMINISTER SAME, &c.

1 The clerk of the District Court of the United States for the District of West Virginia, is authorized to administer an oath, under the 27th section of chapter 176 of the Code of Virginia, ed. 1860. in any case therein provided—the clerk of said court being embraced within the words, "or the clerk of any court."

*Parker v. Clark*, 467

2. See Affidavits No. 3, and

*Idem*, 467

3. See Constitutional Law, Nos. 2, 3 and 4, and

*Ross v. Jenkins*, 281

4. See Attachments—Affidavit for and Sufficiency of Same No. 1, and

*Rittenhouse v. Harman*, 380

5. See Constitutional Law Nos. 14, 15, 17 and 18, and

*Lynch v. Hoffman*, 553, 578

# OBLIGATION OF CONTRACTS.

See Constitutional Law Nos. 7, 8, 9, 11, 12 and 13, and

*List v. Wheeling*, 501

# OFFICIAL RECORDS OF COURTS IN VIRGINIA—WHAT SUFFICIENT ATTESTATION OF COPIES FROM.

See Evidence Nos. 4 and 5, and

*Hinchman, Admr., v. Ballard, Admr.*, 182

# OPENING AND CONCLUSION OF ARGUMENT TO JURY.

See Evidence No. 14, and

*Clay v. Robinson, Admr.*, 348

# PAROL EVIDENCE.

1. See Deeds Nos. 15 and 16, and

*Hurst v. M. V. B. Hurst*, 289

2. See Deeds Nos. 20 and 21, and

*Hurst v. G. L. Hurst*, 329

3. See Parol Evidence—What not Competent to prove in Deeds by, Generally, though not excepted to when offered or afterwards, and

*Warren and Wife v. Syme*, 474

4. See Defective Certificates of Acknowledgments of Deeds and the Curing of the Same, No. 2, and

*Leftwich v. Neal*, 569

# PAROL EVIDENCE—WHAT NOT COMPETENT TO PROVE IN DEEDS BY, GENERALLY, THOUGH NOT EXCEPTED TO WHEN OFFERED OR AFTERWARDS.

See Deeds No. 31, and

*Warren and Wife v. Syme*, 474

# PARTIES TO SUIT—NECESSARY.

1. See Practice in Chancery No. 7, and

*Jameson v. Myles' Exor.*, 311

2. It appearing in the progress of a cause, that a person having such an interest in the subject matter of the suit as to make him a necessary party to the cause is not before the court, it is error to decree in his favor, without his being first made a party and ascertaining his rights.

*Brown v. Knapp*, 678

# PARTNERS AND PARTNERSHIP.

1. Generally, a dissolution of partnership leaves every partner in possession of the full power (unless upon the dissolution it has been exclusively confided and delegated to some other partner or person) to pay and collect debts due to the partnership; to apply the partnership funds and effects to the discharge of the partnership debts; to adjust and settle the unliquidated debts of the partnership; to receive any property belonging to the partnership; and to make due acquittances, discharges, receipts and acknowledgments of their acts in the premises.

*Ruffner, Donnelly & Co. v. Hewitt, Kercheval & Co.*, 585

2. Until the affairs of the partnership are settled and outstanding engagements made good, the partnership must, in contemplation of law, have a continuance, so far as respects the winding up of its affairs.

*Idem*, 585

# PARTNERSHIP—CONTINUED FOR WHAT PURPOSE AFTER DISSOLUTION, IN CONTEMPLATION OF LAW.

See Partners and Partnership No. 2, and

*Raffner, Donnelly & Co. v. Hewitt, Kercher & Co.*, 585

## PAYMENTS.

1. The provisions of the Code of Virginia, that, "though a bank had a branch, \* \* \* all its notes should be received in payment of debts to the bank, whether contracted at the bank, or a branch," applied only when the debts remained due to the bank. When a negotiable promissory note, discounted by the Farmers' Bank of Virginia, had been assigned by the Bank to trustees for the payment of antecedent debts, and the maker, having notice of the assignment, afterwards acquired notes of the Bank, he could not, with these, pay his debts, so assigned, or set them off against it.

*Farmers' Bank v. Willis*, 31

2. When, after the Farmers' Bank had assigned its assets to trustees for its creditors, of which a debtor had notice, he acquired and tendered notes of the Bank in payment of his debt, before the passage of the act in 1873, which provides that debts due to the banks or their trustee or representatives, may be paid in the issue of the banks or their branches, the tender cannot now, by force of the statute, be treated as a payment. And a judgment rendered then, which was correct, should not now be reversed, to enable the debtor to make the payment, or otherwise have the benefit of the legislation. If he could pay the debt in that manner without the judgment, he can pay it notwithstanding the judgment. Whether he could do this, is not decided.

*Idem*, 31

3. See Injunctions Nos. 3 and 4, and

*Lutington v. Handley*, 269

# PAYMENT OF TAXES GROUND FOR INJUNCTION—WHAT ALLEGATIONS NECESSARY IN BILL.

See Injunctions Nos. 10 and 11, and

*Lewis v. Spencer*, 689

## PERPETUATING INJUNCTIONS.

1. See Constitutional Law No. 12, and

*List v. Wheeling*, 501

2. See Injunctions Nos. 10 and 11, and

*Lewis v. Spencer*, 689

## PETITION FOR A RE-HEARING.

1. See Constitutional Law No. 4, and

*Ross v. Jenkins*, 284

2. See Affidavits No. 3, and

*Parker v. Clark*, 467

3. See Constitutional Law Nos. 16 and 19, and

*Lynch v. Hoffman*, 553 573

## PLEAS.

Pleas filed to first declaration and not withdrawn—how regarded as to second declaration filed.

See Practice at Common Law No. 6, and

*Roderick v. Railroad Co.*, 54

## PLEADING—AT LAW.

1. A declaration in an action of trespass, for assault and battery, and false imprisonment, which alleges the cause of complaint sufficiently to make known to the defendant what he is to answer to, so that judgment, according to law and the very right of the cause, could be given, is sufficient, in substance, and a demurrer thereto should be overruled.

*Carskadon v. Williams*, 1

2. In actions against belligerents for acts done in conformity with military authority and under a military order, the plea of belligerent rights is admissible.

*Idem*, 1

3. Pleas of belligerent rights must allege, specifically, all matters necessary to show that the defendant acted in conformity with military authority and under a military order.

*Idem*, 1

4. Where a plea, intended to be a special plea of belligerent rights, does not allege that the defendant committed the act complained of, but does allege that others committed the act, it simply amounts to the plea of "not guilty," and the general issue having been pleaded, it is proper to reject the intended special plea.

*Idem*, 1

5. P. & Son, attorneys, contract, in writing, with L. as follows: "It is agreed that P. & Son are to receive one hundred dollars certain and if the suit (referred to and mentioned in the agreement) is decided in favor of L. then P. & Son are to receive two hundred dollars making three hundred in all."

P. & Son bring an action of assumpsit, setting forth the agreement and alleging that L. dismissed said suit without their consent and thereby hindered P. & Son from prosecuting said suit to a final decision, although plaintiffs were willing and ready so to do. The declaration also contains the common counts for work and labor, and upon an account stated — HELD:

Upon a demurrer to the declaration, and to each count thereof, the same are sufficient.

*Pooley & Son v. Anderson*, 202

6. Though persons who have no joint or common claim, but only separate claims, may be named as plaintiffs, jointly, in one count as well as severally with others, they need not be named jointly, but may severally complain and count.

*Ocheltree v. McClung*, 232

7. When one plaintiff, in his own name alone, complains, gives the notice and proceeds in the case, but counts separately in his own and the name of another, alleging right in each, but not stating that the land described in each count is the same, the count in his own name is good, and the other may be treated as surplusage.

*Idem*, 232

#### PLEADING—IN CHANCERY.

1. See Injunctions Nos. 5, 6 and 7, and

*McClung v. Livesay*, 329

2. See Demurrer in Proceedings in Chancery No. 2, and

*Rittenhouse v. Harman*, 380

3. See Practice in Chancery Nos. 11 and 13, and

*Dickinson v. Railroad Co.*, 390

4. See Practice in Chancery No. 18, and

*Baker v. Oil Tract Co.*, 454

5. See Practice in Chancery No. 20, and

*Warren and Wife v. Syme*, 474

6. See Bill of Discovery, and

*Jones v. Cunningham*, 707

#### POSSESSION

Possession of land by grantor conveyed by deed of trust—how far same operates as a bar in a suit in equity to enforce such deed of trust. See Limitations No. 2, and

*Pitzer, Admr. v. Burns*, 63

#### POSITIVE FRAUD—WHAT.

See Fraud and Fraudulent Misrepresentations No. 1, and

*Dickinson v. Railroad Co.*, 390

#### POWER OF APPOINTMENT.

See Deeds, Nos. 7, 8, 10 and 11, and

*Ocheltree v. McClung*, 232

#### PRACTICE IN APPELLATE COURT.

1. See Appellate Court Nos. 4 and 5, and

*Hinchman, Admr. v. Ballard, Admr.*, 152

2. See Appellate Court No. 7, and

*McMillan v. Ferrell*, 223

3. See Appellate Court No. 8, and

*Ocheltree v. McClung*, 232

4. See Appellate Court Nos. 9 and 10, and

*Williams, Admr. v. Knights*, 335

5. See Appellate Court No. 11, and

*Clay v. Robinson, Admr.*, 348

6. See Appellate Court No. 12, and

*Rittenhouse v. Harman*, 380

7. See Continuances, and

*Davis & Moore v. Walker*, 447

8. When a party obtains an appeal and *superseas* to decrees of the circuit court, rendered upon bill taken for confessed as to him, before applying to the court in which the decree was rendered, or the judge thereof in vacation, to reverse or amend the errors of which he complains, his appeal and *superseas* will be dismissed as improvidently allowed

*Dickinson, Exor. v. Lewis*, 673

9. If an appeal is taken from a decree of a circuit court to this Court and the case is within its jurisdiction, the matter in controversy must be inquired into and determined; and if the decree be found to be right, in all other respects, and erroneous as to costs, this Court will not reverse the decree, because of such error, as to costs, but may, in a proper case, correct the decree, as to the error, and affirm it, as corrected

*Jones v. Cunningham*, 707

10. Upon a motion to grant a new trial on an issue out of chancery, and refused by the court, the bill of exceptions certifies the evidence, and not the facts proved on the trial.—*Held*:

An appellate court will not take cognizance of the case and reverse the judgment, unless by rejecting all the parol evidence for the exceptor, and giving full force and credit to that of the adverse party, the decision of the court below still appears to be wrong.

*Henry v. Davis*, 715

11. See Criminal Practice, and

*State v. Stewart*, 731

#### PRACTICE AT COMMON LAW.

1. The provision of section 2 of chapter 124 of the Code, as amended in 1871, "that process shall be returnable within ninety days from its date," is applicable to a summons in unlawful detainer.

*Gas Company v. Wheeling*, 22

2. Such a summons, returnable to a term of the circuit court, not expressly to the first day, or to any day thereof, upon the authority of a case decided by the court of appeals of Virginia, is good.

*Idem*, 22

3. When a summons in unlawful detainer is returnable to the first day of a term of the circuit court, or to the court generally, when that is equivalent to the first day of the term, it is not necessary that the court should make any order to docket the case.

*Idem*, 22

4. When the plaintiff files an amended declaration, which is complete in itself, and does not refer to or in any manner adopt the former, as part of the same, and to which amended declaration de

defendant replies and issue is joined thereon, the former shall be considered as withdrawn or abandoned.

*Roderick v. Railroad Company,* 54

5. A plea filed to the first declaration, but not withdrawn, will be regarded as filed to the second declaration.

*Idem,* 54

6. See Pleading—At Law, Nos. 6 and 7, and

*Ocheltree v. McClung,* 232

7. See Constitutional Law No. 4, and

*Ross v. Jenkins,* 284

8. See Deeds Nos. 14 and 16, and

*Hurst v. M. V. B. Hurst,* 289

9. When the writ and declaration in the cause are against *two* defendants therein named, and the record shows that the "*defendants*" appeared in court, by their attorney, and pleaded in bar to the declaration, and that the "*defendants*" made a motion, at the same time, to the court in the cause, and afterwards, at another term of the court, the record recites "this day came the parties," &c., and judgment is rendered in favor of the plaintiff against the "*defendants*" it must be taken that the judgment is against the defendants mentioned in the writ and declaration.

*Perry use, &c. v. McHuffman,* 396

10. Where the cause is on the trial docket, whether properly or otherwise, the defendants may appear to it, in court, by attorney, and in person, and plead in bar to the action, whether the writ in the cause has been properly executed or not.

*Idem,* 306

11. See Pleading—At Law, No. 4, and

*Carskadon v. Williams,* 1

12. See Deeds No. 21, and

*Hurst v. G. L. Hurst,* 339

13. See Evidence No. 12, and

*Clay v. Robinson, Admr,* 348

14. Where issues are joined upon pleas of payment and of non-administrator, the plaintiff is entitled to open and conclude the argument of the cause before the jury.

*Idem,* 348

15. See Contracts for Purchase of Lands by Railroad Company, and Payment Therefor in Stock of Company—Execution of such Contracts by Decree of Court No. 1, and

*Dickinson v. Railroad Co.,* 350

16. See Clerk of Court—His Duty—What Considered part of the Record in a Case, and who Decides what is the Record, and

*Warren and Wife v. Syme,* 474

#### PRACTICE IN CHANCERY.

1. Where a chancery suit is heard on bill and answer, and there is no replication to the answer, and the defendant has not taken depositions as if

there was a replication, the answer will be taken as true, so far as it is material and relevant.

*Forqueran v. Donnelly,* 114

2. See Appellate Court Nos. 3, 4 and 5, and

*Hinchman, Admr. v. Ballard, Admr.,* 132

3. It appearing that L. had purchased from T. the larger part of the land sold by him to J. and H. (the plaintiffs in the original bill), and that, at the time of the sale from L. to J. and H. and afterwards, there was a large amount of purchase money due from L. to T., on the land so purchased by L. from T., and that T. had never conveyed the same to L., and that T. was dead, and at his death the purchase money was unpaid, and it not appearing that the legal heirs of T. ever conveyed the land, it was error in the court below to decree the sale of the land, so sold by T. to L. without the personal representative and legal heirs of T. being made parties to the cause and regularly brought before the court by proper process.

*Idem,* 152

4. It was not error in the court below to allow the personal representative and heirs of L. to file a cross-bill, in the original cause of J. and H. aforesaid, asking the court to confirm the original contract of L. with J. and H. for the sale of the land, and to sell the land to pay the unpaid purchase money, due the estate of L. deceased; but the personal representative and legal heirs of said T., deceased, as well as all other parties in interest, should be made parties thereto.

*Idem,* 152

5. It is irregular and error, for a court, upon motion of a person not a party to the suit, and the record not showing he has an interest in the subject matter of the suit, to order a commissioner to ascertain and report whether the consideration of a deed was confederate money or good money: or whether the consideration of a deed was legal or illegal. And it would have been improper for the court, *ex mero motu*, to have made such an order, as the consideration for the deed had not been brought into issue by the pleadings.

*Henderson & Co. v. Alderson,* 217

6. See Injunctions Nos. 3 and 4, and

*Ludington v. Handley,* 269

7. Under the case as stated in Confederate Money No. 1, and

*Jameson v. Myles' Exor.,* 311

It was held to be error to confirm the report of the commissioner of the court allowing J. the debt claimed by M. in his bill, and direct the same to be paid by G., the executor, to J., without C., the obligee in the two bonds, being first made a party to the cause.

8. See Injunctions No. 7, and

*McClung v. Livesay,* 329

9. See Demurrer in Proceedings in Chancery No. 2, and

*Rittenhouse v. Harman*, 380

10. When the defendants are all non-residents of the State, and none have before appeared, the record states that the cause was referred to a commissioner to take an account, &c., by consent of the parties. This implies that all of the defendants appear and submit to the jurisdiction of the court.

*Idem*, 380

11. Although "every material allegation of the bill not controverted by answer, shall, for the purposes of the suit, be taken as true, and no proof thereof shall be required," as provided by section 36 of chapter 125 of the Code of West Virginia, still, if one defendant does controvert the material allegations of the bill, by his answer, and his interest may be affected by the truth of such allegations, the failure of another defendant or defendants to do so, does not dispense with the necessity of proof, as to such allegations, as to the defendant who does controvert them by his answer.

*Dickinson v. Railroad Co.*, 390

12. See Proceedings to Enforce the Lien a Judgment and the Proof of such Judgment Nos. 1, 2, 3, 4, 5, 6, 7, and 8, and

*Idem*, 390

13. Generally, though perhaps not universally, a cross-bill is considered as a defence to the original bill, or a proceeding necessary to a complete determination of a matter already in litigation.

*Idem*, 390

14. S., conveyed a tract of land in Wirt county to W., and F., trustees for the R. O. T. Co. The R. O. T. Co., is a foreign corporation and is indebted to B. And B., to collect his debt, sued out, in chancery, a foreign attachment against the R. O. T. Co., as a non-resident of this State and caused the same to be levied on said tract of land and some personal property. The R. O. T. Co., before the cause was heard, appeared in court and filed its answer to B's bill, contesting his alleged debt. On the hearing of the cause on the bill, answer, depositions, &c., the circuit court rendered a personal decree against the R. O. T. Co., for the amount of B's debt or claim and the costs of suit, and also decreed that so much of said land and personal property on which the attachment was levied, as should be necessary to pay the said debt and costs of suit, be sold, for cash, for that purpose, &c.—  
HELD:

That, as the R. O. T. Co., appeared and answered, it was not error for the circuit court to render a decree against it for the amount of B's debt and costs of suit.

*Baker v. Oil Tract Co.*, 454

15. That it was error in the circuit court to decree the sale of the land without W. & F., the trustees, being made parties to the cause.

*Idem*, 454

16. If the decree had been otherwise correct, it was not error to decree the sale to be made for cash.

*Idem*, 454

17. When a decree in chancery is made directing the sale of real and personal property by a special commissioner, to pay a debt, for cash, it is generally proper, that the decree should require bond with good personal security to be given before the court, or given and filed with the clerk of the court, before the sale shall be made, in a penalty fixed in the decree, and conditioned accordingly to law.

*Idem*, 454

18. In a suit or proceeding by foreign attachment, in equity, to collect the price of two oil tanks, it is competent for the defendant to plead and rely on a breach of warranty, as to the quality of the material of the oil tanks in reduction or abatement of the price, and when such defence is pleaded and relied on in the answer, it is unnecessary to file a cross bill for that purpose.

*Idem*, 454

19. It is not error in a circuit court to refuse to allow a defendant to file a cross-bill in a chancery cause, praying a suspension of further proceedings in the original suit, until an account prayed in the cross-bill can be taken, when the filing of the cross-bill has been unreasonably delayed, and especially where the complainant in the cross-bill fails to state any reason for such delay.

*Idem*, 454

20. Section thirty-six of chapter one hundred and twenty-five of the Code, which provides that every material allegation in a bill, not controverted by the answer, shall, for the purposes of the suit, be taken as true, does not require a more special denial than was sufficient before its adoption. But, as formerly, the plaintiff, upon proper allegations, may interrogate the defendant, and then he will be required to answer each proper interrogatory to his answer. If the defendant does not answer properly the plaintiff may except to the answer. When, however, he fails to do so, a general denial of the allegations of the bill, will make it necessary that the plaintiff shall prove the facts alleged and so controverted, that are in their nature affirmative.

*Warren and Wife v. Syme*, 474

21. A court of equity, upon a formal hearing, decrees that the defendant remove obstructions to a well, which the plaintiff claims the right to use, so as to afford the plaintiff access to the well at all times, unless, and until otherwise ordered by the court; and if the obstruction be not removed



within ten days, the sheriff, upon application of plaintiff, shall remove it; and that an injunction previously awarded, inhibiting the defendant from obstructing the plaintiff's using the well till the rights of the claimants could be settled, shall be "continued," and that an account of the expenses of repairing the well be taken: And the court, on a final hearing dismisses the bill:—the former decree was merely interlocutory; and the dismissal of the bill dissolves the injunction.

*Idem*, 474

22. When the plaintiff in a bill alleges sufficient cause for making one person a defendant, but not for making others such, and seeks no relief, takes no decree nisi, and proves no right to relief against the latter, who makes no defence, and the case being matured as to a proper defendant, the plaintiff acquiesces in a hearing; and the bill is dismissed generally; the plaintiff, upon appeal, has no right on that account to have the decree reversed.

*Idem*, 474

23. See Constitutional Law Nos. 10, 12 and 13, and

*List v. Wheeling*, 501

21. See Renting of Lands by Decree or Order of Court Nos. 1 and 2, and

*Hollingsworth & Co. v. Brooks*, 552

25. Allegations in a bill, denied in an answer—the bill and answer being both under oath—appearing to be established by satisfactory proofs in accordance with section fifty-nine of chapter one hundred and twenty-five of the Code; it is error to dismiss the bill.

*Brown v. Kaapp*, 678

26. See Parties to a Suit—Necessary, No. 2, and

*Idem*, 678

27. To entitle a person, who claims to have a mortgage lien on land attached by a creditor, in a suit in equity in which an attachment is sued out against a non-resident debtor, under the twenty-fourth section of chapter one hundred and six of the Code of West Virginia, to dispute the validity of the attachment, such person must appear in the court in which the proceeding is had and file his petition and give security for costs; and so as to contesting the priority of the attaching creditor's lien over the mortgage lien.

*Tappan v. Pease*, 682

28. See Injunctions Nos. 10 and 11, and

*Levia v. Spencer*, 689

29. See Bill of Discovery, and

*Jones v. Cunningham*, 707

30. See Practice in Appellate Court No. 10, and

*Henry v. Davis*, 715

#### PREFERENCE TO ATTACHING CREDITOR—HOW SAME AFFECTED BY PROCEEDINGS IN BANKRUPTCY AGAINST DEBTOR.

See Bankruptcy Nos. 3, 4 and 5, and

*Mason & Hoge v. Warthen* 532

#### PRELIMINARY EXAMINATION FOR FELONY—WHEN PRISONER HAS WAIVED THE RIGHT TO SAME.

See Criminal Practice, and

*State v. Stewart*, 731

#### PRESENT GRANT OF RIGHT IN A DEED.

See Deeds No. 22, and

*Warren and Wife v. Syme*, 474

#### PRESUMPTIONS FROM STATEMENTS IN RECORDS OF COURTS—WHAT MAY BE MADE.

1. See Practice at Common Law No. 9, and

*Perry, use, &c., v. McHuffman*, 306

2. See Appellate Court No. 9, and

*Williams, Admr. v. Knights*, 335

#### PRIORITY OF CREDITORS.

Under the facts and circumstances stated in Confederate Money No. 1, and

*Jameson v. Myles' Exor.*, 311

It was held that K. did not acquire, by virtue of the deed of trust, the right to have his said debt against the estate of M. satisfied out of the proceeds of the tract of land in the said deed mentioned, in preference to the other creditors of M.

#### PRIVILEGED COMMUNICATIONS.

See Evidence Nos. 15 and 16, and

*National Bank v. National Bank*, 544

#### PROCEEDINGS IN SUITS IN INFERIOR COURTS, BY CONSENT—WHEN PRE-SUMED IN APPELLATE COURT.

See Appellate Courts No. 3, and

*Hinchman, Admr. v. Ballard, Admr.* 152

#### PROCEEDINGS TO ENFORCE THE LIEN OF A JUDGMENT, AND THE PROOF OF SUCH JUDGMENT.

1. An abstract, as applied to records, ordinarily means a mere brief and not a copy of that from which it is taken, and a paper writing being only an abstract of an alleged judgment, and attested a copy abstract, although attested by the clerk of the court in which the judgment was rendered, can not ordinarily be read as proof of the alleged judgment, where the existence of the judgment is denied.

*Dickinson v. Railroad Co.*, 390

2. Where a judgment or decree is obtained for a debt, in a proceeding in chancery to enforce the lien of such judgment or decree against lands, ordinarily, it is not necessary that a complete copy of the whole record of the case in the court in which the judgment or decree was had, should be produced or filed, but only a properly authenticated copy of such judgment or decree.

*Idem*, 390

3. In such case a copy of the judgment is an extract from the record of the cause, and not a complete copy of the whole record, and being an extract from the record, and a copy of the judgment, as entered, it may be read as evidence in the cause.

*Idem*, 390

4. In such case where the fact to be shown is merely that a decree or judgment has been rendered proof of the other proceedings ordinarily, (though perhaps not universally) will not be necessary, but the adversary party will be at liberty to show any other matter in the record which may avoid the effect of that which is introduced.

*Idem*, 390

5. An authenticated copy from the Recorder's docket of an official abstract of a judgment docketed under the provisions of the 3d and 4th sections of chapter 139 of the Code of 1868, of West Virginia, is evidence that such abstract was docketed, and when, and of notice to purchasers of land upon which the alleged judgment is claimed to be a lien, when the existence of such judgment is properly proved; but where judgment is put in issue, ordinarily, an authenticated copy of such abstract, as docketed by the Recorder, will be received as proof of the judgment and dispense with the necessity of producing a properly authenticated copy of the judgment.

*Idem*, 390

6. Section 5 of chapter 130 of the Code of 1868, of West Virginia, applies as well to the records of the District Court of the United States, held within this State, as to the records of the courts of this State; and a copy of a judgment rendered in the District Court of the United States, in this State, attested by the clerk of such court, according to the provisions of said last named section and chapter will ordinarily be received as evidence of the existence of such judgment.

*Idem*, 390

7. The 19th section of chapter 130 of the Code of 1868, of West Virginia, does not apply to the records and judicial proceedings of the District Court of the United States, held within this State.

*Idem*, 390

8. A suit in equity to sell land to satisfy a judgment lien, or to enforce the payment of the purchase money, if it appears that there is a prior lien for unpaid purchase money on the land, those entitled to the benefit of such prior purchase money lien, should be made parties to the suit.

*Idem*, 390

# PROHIBITION.

1. B. was indicted in the circuit court of the county of Logan for the murder of M. on the 12th

day of July, 1870. At the time the indictment was found, B. was in jail in said county upon a charge of murder. On the 20th day of March, 1873, B., who had been bailed, appeared in said court in discharge of his recognizance of bail, and on the 22d day of March, 1873, the court, on the motion of B., changed the venue, and sent the cause for trial to the county of Cabell. At the circuit court of the county of Cabell, held on the 27th day of May, 1873, B. was set to the bar of the court, in custody of the jailor of Cabell county, and not having plead or demurred to the indictment, he objected to being tried by the circuit court of Cabell county, upon the indictment, until he was first examined by the county court in pursuance of the provisions of the act of the Legislature, approved April 3, 1873, entitled "An act providing for the examination of persons charged with felony, before the county court;" but the court overruled B's objection, and decided that B. was not entitled to an examination, under the provisions of said act of the Legislature, and that the court had a right to proceed, and would proceed, to trial and final judgment upon the indictment without such an examination being had; to which opinion and decision of the court, B. excepted.—HELD:

That if said act of the Legislature of April 3d, 1873, be valid, and applies to B's case (which is not now decided), and the court erred in its judgment in denying B. said examination, before the county court, before proceeding to final trial upon the indictment, a writ of prohibition does not lie from the Supreme Court of Appeals to the judge of the circuit court to prohibit him proceeding further with the trial of the indictment until B. shall be examined by the county court, the circuit court having original and general jurisdiction of all cases of felony, conferred upon it by the Constitution and laws: AND HELD FURTHER, that B's proper and appropriate remedy for the correction of such error, if error it be, is by writ of error in case he should be convicted in the said circuit court of felony, upon said indictment, and not by prohibition before trial and conviction.

*Buskirk v. Judge of Circuit Court*, 91

2. Prohibition can only be interposed in a clear case of excess of jurisdiction on the part of some inferior judicial tribunal. Where the matter is clearly within the jurisdiction of the inferior court, a mere error in the proceedings may be ground of appeal or review but not of prohibition.

*Idem*, 91

3. See Appellate Court No. 2.

PROOF OF JUDGMENTS IN SUITS IN EQUITY TO ENFORCE JUDGMENT LIENS, —WHAT, WHERE EXISTENCE OF SAME IS DENIED.

See Proceedings to Enforce the Lien of a Judge

ment and the Proof of such Judgment Nos. 2, 3, 4, 5, 6, 7 and 8, and

*Dickinson v. Railroad Co* 390

# PROOF OF MATERIAL ALLEGATIONS IN A BILL IN CHANCERY—WHEN NECESSARY.

1. See Practice in Chancery No. 11, and

*Dickinson v. Railroad Co.*, 390

2. See *Warren and Wife v. Syme*, 474

# PROOF OF RECORDS—WHAT SUFFICIENT ATTESTATION OF COPY FROM RECORDS OF COURTS IN VIRGINIA.

See Evidence Nos. 4 and 5, and

*Hinchman, Admr. v. Ballard, Admr.* 152

# PROPER PARTIES—WHAT IN CERTAIN CASES BEFORE DECREE FOR SALE OF LANDS SHOULD BE MADE.

1. See Practice in Chancery No. 3, and

*Hinchman, Admr. v. Ballard, Admr.*, 152

2. See Proceedings to Enforce the Lien of a Judgment and the Proof of such Judgment No. 8, and

*Dickinson v. Railroad Company*, 390

# PROSECUTING ATTORNEY—INCREASE OR DECREASE OF SALARY OF.

See Constitutional Law Nos. 20 and 21, and

*Rucker v. Supervisors*, 661

# PUBLIC OFFICER—INCREASE OR DECREASE OF SALARY OF.

See Constitutional Law No. 20 and 21, and

*Rucker v. Supervisors*, 661

# PUBLIC UTILITY—WHAT WITHIN MEANING OF.

See Taking Land for Purposes of Public Utility, by Corporations, and

*Salt Company v. Brown*, 191

# PURCHASERS AT DELINQUENT TAX SALES.

1. A purchaser of a part of a tract of land at a sheriff's delinquent tax sale, made in the year 1860, by the purchase, payment of the purchase money, and delivery to him of the sheriff's receipt therefor, acquired the right, if the land was not redeemed in the manner prescribed by the 13th section of chapter 37 of the Code of Virginia, within 2 years from the sale, to obtain a deed in the mode and manner prescribed by the 15th and 17th sections of said chapter, without the privilege of the former owner to redeem until after the expiration of the first year from the expiration of the two years, without the deed having been made to the purchaser.

*Forgeran v. Donnelly*, 114

2. The right so acquired grew directly out of the contract of sale made in pursuance of the law under which it was made. The contract was a civil contract. The right is an equitable right, or interest, entitled, on the failure to redeem, to ripen into a full legal title.

*Idem*, 114

3. The equitable right or interest, of the purchaser, in such case where he paid the purchase money and received the sheriff's receipt, was secured by the 1st section of the 9th article of the Constitution of 1863.

*Idem*, 114

4. See Statutes Relating to the Same Subject, —How Construed, and

*Idem*, 114

5. See Repeal of Statutes No. 1, 2, 3 and 4, and

*Idem*, 269

# RAILROAD COMPANY.

1. See Common Carrier No. 1, and

*Roderick v. Railroad Co.*, 54

2. See Condemnation of Lands, No. 1, and

*Railroad Company v. Halstead*, 361

3. See Contracts Nos. 1 and 2, and

*Struss v. Railroad Co.*, 368

4. See Contracts for Purchase of Lands by Railroad Company—Execution of such Contract by Decree of Court, No. 1, and

*Dickinson v. Railroad Co.*, 395

5. See Constitutional Law, Nos. 7 to 13 inclusive and

*List v. Wheeling*, 501

6. See Condemnation of Lands, No. 3, and

*Railroad Company v. Tyree*, 693

# RESCISSION OF CONTRACTS.

A party seeking the rescission of a contract, on the ground of misrepresentations, must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied.

*Ludington v. Renick*, 273

# RECITALS IN DEEDS—WHAT EVIDENCE OF.

See Deeds Nos. 29 and 30, and

*Warren and Wife v. Syme*, 474

# RECORDS OF COURTS IN VIRGINIA—WHAT SUFFICIENT ATTESTATION OF COPY FROM.

See Evidence Nos. 4 and 5, and

*Hinchman, Admr., v. Ballard, Admr.*, 152

# RECORDATION OF DEED BEFORE 1819—EFFECT OF—AND WHAT EFFECT OF SUCH RECORDATION AFTER 1819.

See Deeds No. 26, and

*Warren and Wife v. Syme*, 474

**RECORDATION OF DEEDS REGULATED BY STATUTE ALONE.**

See Deeds No. 25, and  
*Warren and Wife v. Syme,* 474

**RELEASE OF ASSIGNOR OF CHOSE IN ACTION BY ASSIGNEE.**

See Evidence Nos. 8 and 9, and  
*White v. Hearer, Sheriff, &c.,* 324

**RENTING OF LANDS BY DECREE OR ORDER OF COURT.**

1. The Supreme Court of Appeals, decided in this cause, that the circuit court had no right to make a decree to rent the land of the defendants, without their consent, for the year 1871—the circuit court not having first determined, by its decree, that there was a lien or liability upon the said land, or the rents and profits thereof, for the payment of some debt or liability.—**Held:**

As the legitimate effect of said decision, that a similar order, directing the land to be rented for the previous year of 1870, is, for the same reason, erroneous, and when coming in conflict with the rights of said defendants, as subsequently settled by said decision of the Supreme Court of Appeals must be regarded as of no validity.

*Hollingsworth & Co. v. Brooks,* 558

2. That it also follows, as a legitimate consequence of said decision, that the circuit court may properly make an order directing the rents, or the notes and bonds taken for the same, for the year 1870, to be paid or delivered to the parties entitled to the rightful possession of said property or land during that year—said order being based upon their petition filed in court.

*Idem,* 559

**REPEAL OF STATUTES.**

1. The act passed October 7, 1863, entitled, "An act providing how lands heretofore or hereafter sold, and not redeemed, shall be surveyed and conveyed," was not repealed by the act passed February 27, 1866, entitled, "An act to provide for the sale of real estate returned delinquent for the non-payment of taxes."

*Forqueran v. Donnelly,* 114

2. See Statutes Relating to the Same Subject—How Construed, and

*Idem,* 114

3. That such parts of chapter 37 of the Code of Virginia as were material and substantial parts of the contract of sale of a tract of land for taxes, sold by the sheriff, thereunder, in 1860, should be held to remain and continue in force, as to such contracts, in connection with the act of the Legislature entitled "An act providing how lands heretofore or hereafter sold, and not redeemed, shall

be surveyed and conveyed," passed on the 7th day of October, 1863, notwithstanding the provisions of the 32d section of the act of the Legislature passed on the 27th day of February, 1866, entitled "An act to provide for the sale of real estate returned delinquent for the non-payment of taxes."

*Idem,* 114

4. Courts will not readily intend, where the Legislature enacts a general law upon a given subject and repeals an existing general law of like character, upon the same subject, that it was the intention of the Legislature, by the repeal, to deprive those who acquired just rights and interests under the old law, of all remedy or to extinguish their rights or interests unless such intention is manifest. But courts may properly, in such case, rather than the parties should be left without remedy, intend that the proceeding or remedy, provided by the new law, as far as practicable, was intended by the Legislature to be applied to rights and interests acquired under the old law.

*Idem,* 114

**REPEAL OF STATUTES BY IMPLICATION.**

1. Statutes are not considered to be repealed by implication unless the repugnance between the new provision and a former statute be plain and unavoidable.

*Forqueran v. Donnelly,* 114

2. A construction which repeals former statutes or laws by implication, and divests long approved remedies is not favored by the courts.

*Idem,* 114

3. See Statutes Relating to the Same Subject—How Construed, and

*Idem,* 114

4. See Repeal of Statutes Nos. 1, 3 and 4, and

*Idem,* 114

**REPORT OF COMMISSIONERS APPOINTED IN PROCEEDINGS TO CONDEMN LANDS.**

1. See Taking Land for Purposes of Public Utility, by Corporations No. 1, and

*Salt Company v. Brown,* 191

2. See Condemnation of Lands No. 1, and

*Railroad Company v. Halstead* 301

3. See Condemnation of Lands No. 3, and

*Railroad Co. v. Tyree,* 623

**RES ADJUDICATA.**

A case finally decided in the Supreme Court of Appeals has become "*res adjudicata*," and is no longer the subject of review in that Court

*Camden v. Werninger,* 523

# **RESTRAINT OF COLLECTION OF TAXES BY INJUNCTION—WHAT ALLEGATIONS NECESSARY IN BILL.**

1. See Injunctions Nos. 5 and 6, and  
*McClung v. Licesay*, 329
2. See Injunctions Nos. 10 and 11, and  
*Lewis v. Spencer*, 689

# **RESTRAINT OF SALES OF LANDS UNDER DEEDS OF TRUST, BY INJUNCTION.**

- See Injunctions No. 2, and  
*Reed v. Patterson*, 263

## **REVERSION OF ESTATES.**

- See Deeds No. 8, and  
*Ocheltree v. McClung*, 232

# **REVERSAL OF JUDGMENTS AND DECREES.**

1. As to Reversal of Judgments to plead or make payments, or otherwise have the benefit of legislation after rendition of judgment, see Payments No. 2, and

*Farmers' Bank v. Willis*, 31

2. See Appellate Court No. 5, and  
*Hinchman, Admr., v. Ballard, Admr.*, 152

3. See Practice in Chancery No. 22, and  
*Warren and Wife v. Syme*, 474

## **RIGHTS AND DUTIES OF AGENTS.**

- See Agents and Agency Nos. 2, 3, 4 and 5, and  
*Ruffner, Donnally & Co. v. Hewitt, Kercheval & Co.*, 585

# **RULES OF EQUITY AS TO LIMITATIONS.**

- See Limitations No. 1, and  
*Pitzer, Admr., v. Burns*, 63

## **SALE OF LAND IN GROSS.**

Upon the sale of a tract of land in gross, and not by the acre, the purchaser is not entitled to any abatement of the purchase money for deficiency in the quantity of the land, there being no fraud, misrepresentation or mistake; and the evidence showing that the parties contemplated a probable deficiency in the number of acres was not relied upon by the parties as a material element in the purchase.

*Reed v. Patterson*, 263

# **SCALING DEBTS FOUNDED UPON A CONFEDERATE CONSIDERATION.**

1. See Confederate Money No. 1, and  
*Jameson v. Myies' Error*, 311
2. See Confederate Money No. 2, and  
*Brightwell, Trustee, v. Hoover*, 342

## **SCHEDULE TO CONSTITUTION OF 1872.**

Sections 1, 2, 17 and 21 of Schedule to Constitu-

tion of 1872, construed in Appellate Court No. 7 and

*McMillan v. Ferrell*, 223

## **SET OFF.**

- See Payments Nos. 1 and 2, and  
*Farmers' Bank v. Willis*, 31

## **SETTLEMENT OF ESTATES.**

See Administrators, Appointment of in Place of those Appointed under Confederate Authority—Their Powers, &c., No. 1, and  
*Clay v. Robinson, Admr.*, 348

## **SETTLED ACCOUNTS.**

1. A settled account, will, generally, be deemed conclusive between the parties, unless some fraud, mistake, or omission, or inaccuracy is alleged and shown.

*Ruffner, Donnally & Co. v. Hewitt, Kercheval & Co.*, 583

2. In cases of settled account a court of equity will not, generally, open the account, but will, at most, only grant liberty to surcharge and falsify, unless in cases of apparent fraud.

*Idem*, 585

# **SETTING ASIDE AWARDS BY A COURT OF EQUITY—FOR WHAT REASONS.**

- See Arbitration and Award No. 3 and 4, and  
*Dickinson v. Railroad Co.*, 390

# **SERVITUDES ANNEXED BY DEED, BY IMPLICATION, TO RESPECTIVE LOTS OF LAND AS EASEMENTS APPURTENANT.**

- See Deeds No. 23, and  
*Warren and Wife v. Syme*, 474

# **SHIFTING AND REVESTING OF ESTATES BY DEEDS OF BARGAIN AND SALE—LIMITED TO TAKE EFFECT WHEN.**

- See Deeds No. 6, and  
*Ocheltree v. McClung*, 232

# **SPECIFIC EXECUTION OF CONTRACTS BY COMMITTEES OF LUNATICS—WHEN COURT WILL DECREE SAME.**

- See Estates of Lunatics Nos. 2, 3, 5, 6 and 7, and  
*Hinchman, Admr. v. Ballard, Admr.*, 152

# **SPECIFIC PERFORMANCE OF CONTRACTS RELATING TO THE SALE OF LANDS—WHEN DECREES FOR MADE.**

- See Estates of Lunatics No. 7, and  
*Hinchman, Admr. v. Ballard, Admr.*, 152

STATED ACCOUNTS.

Generally, in equity, an account current rendered by one merchant to another, received and held without objection, will be deemed a stated account, and the objection to such accounts rendered, which will prevent them from being stated accounts, must be made within a reasonable time, and it lies upon the party contesting the accounts, so rendered, to prove that he made objection within a reasonable time.

*Ruffner, Donnelly & Co. v. Hewitt, Kercheval & Co.*, 585

STATUTES.

The 6th section of chapter 16 of the Acts of the Legislature of West Virginia of 1872-3, entitled, "An act organizing the Supreme Court of Appeals, defining its jurisdiction and powers, and prescribing its manner of proceeding," construed in

*Buskirk v. Judge of Circuit Court*, 91

2. An act approved April 3, 1873, entitled, "An act providing for the examination of persons charged with felony, before the county court," construed in

*Idem*, 91

3. See Repeal of Statutes No. 1, 3 and 4, and  
*Forqueran v. Donnelly*, 114

4. See Repeal of Statutes by Implication Nos. 1 and 2, and

*Idem*, 114

5. See Statutes Relating to the Same Subject—How Construed, and

*Idem*, 114

6. Section 45 of chapter 43 of the Code of West Virginia, considered in

*Salt Company v. Brown*, 191

7. Act passed December 21, 1872, entitled, "An act regulating appeals, writs of error and *superseas*," considered in appellate court No. 7, and

*McMillan v. Ferrell*, 223

8. Act passed January 11, 1873, and especially the 4th section thereof, entitled, "An act organizing the Supreme Court of Appeals, defining its jurisdiction and prescribing its manner of proceeding," construed in Appellate Court No. 7, and

*Idem*, 223

9. Act passed February 11, 1865, entitled, "An act to amend and re-enact sections 23, 27 and 28 of chapter 151 and section 13 of chapter 170 of the Code of Virginia;" also section 27 of chapter 106 of the Code of West Virginia declared unconstitutional and contrary to the Constitution of the United States, in Constitutional Law Nos. 2, 3 and 4, and

*Ross v. Jenkins*, 284

10. Section 14 of chapter 42 of the Code of West Virginia, construed in the Condemnation of Lands No. 1, and

*Railroad Company v. Halstead*, 301

11. Section 22 of chapter 180 of the Code of West Virginia, construed in Evidence Nos. 7 and 8, and

*White v. Heavner, Sheriff, &c.*, 324

12. Act passed April 7, 1873, entitled, "An act providing for the adjustment of certain liabilities arising under contracts made between the first day May 1861, and the first day of May, 1865," construed in

*Brightwell, Trustee v. Hoover*, 342

13. Act passed in 1867, relating to attachments and amendatory of Code of Virginia, 2nd ed., construed in

*Rittenhouse v. Harman*, 380

14. Section 5 of chapter 180 of the Code of 1868, of West Virginia, applies only to the records of courts held within the State,

*Dickinson v. Railroad Co.*, 390

15. Section 19 of chapter 180 of the Code of West Virginia and sections 3 and 4 of chapter 139 of same, construed in proceedings to enforce the lien of a judgment and the proof of such judgment No. 7, and in

*Idem*, 390

16. Section 27 of chapter 176, Code of Virginia, 1860, construed in Oath—Who may Administer the Same, and

*Parker v. Clark*, 467

17. Section 36 of chapter 125 of the Code of West Virginia, construed in Decrees in Chancery No. 20, and

*Warren and Wife v. Syme*, 474

18. Act passed February 11, 1865, entitled, "An act to amend and re-enact sections 2, 3, 27 and 28, of chapter 151 and section 13 of chapter 170 of the Code of Virginia; and also section 27 of chapter 106 of the Code of West Virginia declared to be unconstitutional and contrary to the Constitution of the United States, in Constitutional Law Nos. 15 and 18, and

*Lynch v. Hoffman*, 538, 578

19. Section 66 of chapter 39 of the Code of West Virginia, construed in

*Rucker v. Supervisors*, 661

20. Section 11 of chapter 151, Code of Virginia of 1860, construed in Foreign Attachments in Equity No. 1, and

*King v. Board*, 701

STATUTE OF LIMITATIONS.

1. The limitation in equity, as against mortgages and deeds of trust conveying property to a trustee, to secure the payment of debts, when the statute of limitation does not govern, is twenty years; and, under circumstances, a greater period. Such limitation is barred upon presumption of payment, and not upon analogy to the statute of limitations, as applicable to the action of ejectment or any other real action; but by analogy to the limitation from presumption of payment in

actions at law, upon a single bill, if it is not a mere rule of equity.

*Pitzer, Admr. v. Burns,* 63

2. In a suit in equity to enforce a deed of trust given upon land to secure the payment of money, the fact that the grantor remained in possession of the land for 17 years, after the right to sell the property to pay the debt accrued, does not operate a bar to the suit.

*Idem,* 63

3. In a suit commenced in 1867, and pending on the 1st day of April, 1869, and at no time barred, in computing the limitation to the action, the time from the seventeenth day of April, 1861, to the first day of March, 1869, must be excluded from the computation.

*Idem,* 63

#### STATUTES RELATING TO THE SAME SUBJECT—HOW CONSTRUED.

Several statutes *in part materia*, and relating to the same subject, are to be taken together and compared in the construction of them, because they are considered as having one object in view and as acting on one system. And the rule applies though some of the statutes may have expired, or are not referred to in the other acts.

*Forqueran v. Donnelly,* 114

#### SUBSCRIPTIONS BY MUNICIPAL CORPORATIONS TO THE CAPITAL STOCK OF RAILROAD COMPANIES.

See Constitutional Law Nos. 7, 8, 9, 10, 11, 12 and 13, and

*List v. Wheeling,* 501

#### SUITOR'S TEST OATH DECIDED TO BE UNCONSTITUTIONAL.

1. See Constitutional Law Nos. 2, 3 and 4, and

*Ross v. Jenkins,* 284

2. See Constitutional Law Nos. 15 and 18, and

*Lynch v. Hoffman,* 553, 578

#### SUMMONS IN UNLAWFUL DETAINER—RETURN DAY OF.

See Practice at Common Law Nos. 1, 2 and 3, and

*Gas Company v. Wheeling,* 22

#### SURVIVORSHIP.

See Deeds No. 8, and

*Ocheltree v. McClung,* 232

#### TAKING LAND FOR PURPOSES OF PUBLIC UTILITY, BY CORPORATIONS.

1. An incorporated company, being the owner of coal lands, desires to obtain a subterranean right of way through or under the lands of another person, for the purpose of mining, and re-

moving its own coal and applies to court for the benefit of the forty-fourth and forty-fifth sections of chapter forty-three of the Code.

The report of the commissioners and the evidence in the case, show that the company is the owner of some thirty acres of coal land, from which the coal could not be mined and transported without going through the land of the defendants; the company use said coal for the purpose of manufacturing salt at their furnaces, and to sell to the people living in and about the town of Hartford City; that the people living in and about said town could obtain coal, also, from other sources and that the public would not use the subterranean way set out and described in the commissioners' report, through the land of the company, but the company only.—HELD:

That the report and evidence do not show that the purpose for which the property is to be taken is of such public utility as that said report should be confirmed by the court, under the forty-fifth section of said forty-third chapter of the Code.

*Salt Company v. Broncn,* 191

See Condemnation of Lands No. 1, and

*Railroad Company v. Halstead,* 301

#### TAX SALES.

1. See Deeds for Lands Purchased at Delinquent Tax Sales Nos. 1, 2 and 3.

2. See Purchasers at Delinquent Tax Sales Nos. 1, 2 and 3.

3. See Repeal of Statutes Nos. 3 and 4.

4. See Repeal of Statutes by Implication Nos. 1 and 2.

5. See Statutes Relating to the Same Subject—How Construed No. 1, and

*Forqueran v. Donnelly,* 114

#### TAXES AND TAXATION.

1. See Deeds for Lands purchased at Delinquent Tax Sales Nos. 1, 2 and 3.

2. See Purchasers at Delinquent Tax Sales Nos. 1, 2 and 3.

3. See Repeal of Statutes No. 1; Repeal of Statutes by Implication Nos. 1 and 2.

4. See Statutes Relating to the Same Subject—How Construed No. 1, and

*Forqueran v. Donnelly,* 114

5. See Injunction Nos. 5 and 6, and

*McClung v. Lincany,* 379

6. See Constitutional Law Nos. 7 to 13, inclusive, and

*List v. Wheeling,* 301

7. See Injunctions Nos. 10 and 11, and

*Lewis v. Spencer,* 670

#### TELEGRAPHIC DISPATCHES—WHEN EVIDENCE.

See Evidence Nos. 15 and 16, and

*National Bank v. National Bank,* 544

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